No. 06-1595

Title:	Vicky S. Crawford, Petitioner v. Metropolitan Government of Nashville and Davidson County, Tennessee
Docketed:	June 1, 2007
Lower Ct:	United States Court of Appeals for the Sixth Circuit
Case Nos.:	(05-5258)
Decision Date:	November 14, 2006
Rehearing Denied:	March 1, 2007

Questions Presented

~~Date~~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
May 30 2007	Petition for a writ of certiorari filed. (Response due July 2, 2007)
Jun 11 2007	Order extending time to file response to petition to and including July 16, 2007.
Jun 14 2007	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioner.
Jul 16 2007	Brief of respondent Metropolitan Government of Nashville and Davidson County, Tennessee in opposition filed.
Jul 16 2007	Brief amicus curiae of National Employment Lawyers Association filed.
Jul 16 2007	Brief amici curiae of Tennessee Education Association and the Metropolitan Nashville Education Association filed.
Jul 27 2007	Response to brief of amici curiae TN Education Association, et al by respondent filed.
Jul 30 2007	Reply of petitioner Vicky S. Crawford filed. (Distributed)
Aug 1 2007	DISTRIBUTED for Conference of September 24, 2007.
Oct 1 2007	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
Dec 18 2007	Brief amicus curiae of United States filed.
Dec 26 2007	DISTRIBUTED for Conference of January 11, 2008.
Jan 2 2008	Supplemental brief of respondent Metropolitan Government of Nashville and Davidson County, Tennessee filed. (Distributed)
Jan 14 2008	DISTRIBUTED for Conference of January 18, 2008.
Jan 18 2008	Petition GRANTED. The brief of petitioner is to be filed on or before Monday, February 25, 2008. The brief of respondent is to be filed on or before Monday, March 24, 2008. A reply brief, if any, is to be filed in accordance with Rule 25.3 of the Rules of this Court.
Feb 15 2008	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including April 2, 2008.

Mar 25 2008	The time within which to file the joint appendix and petitioner's brief on the merits is further extended to and including April 9, 2008.
Apr 7 2008	Consent to the filing of amicus briefs in support of either party, or neither party, received from counsel for the petitioner.
Apr 9 2008	Joint appendix filed. (Statement of costs received)
Apr 9 2008	Brief of petitioner Vicky S. Crawford filed.
Apr 16 2008	Brief amicus curiae of United States filed.
Apr 16 2008	Brief amici curiae of National Employment Lawyers Association, et al. filed.
Apr 16 2008	Brief amici curiae of Tennessee Education Association, and the Metropolitan Nashville Education Association filed.
Apr 16 2008	Consent to the filing of amicus briefs, in support of either party or neither party, received from counsel for respondent.
Apr 16 2008	Brief amici curiae of Leadership Conference on Civil Rights, et al. filed.
Apr 16 2008	Brief amici curiae of National Women's Law Center, et al. filed.
Apr 16 2008	Brief amici curiae of Ohio, and 19 Other States and Commonwealths filed.
May 6 2008	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
May 9 2008	Brief of respondent Metropolitan Government of Nashville and Davidson County, Tennessee filed.
May 15 2008	Brief amicus curiae of Chamber of Commerce of the United States of America filed.
May 16 2008	Brief amici curiae of Equal Employment Advisory Council, et al. filed.
May 16 2008	Brief amicus curiae of National School Boards Association filed.
Jun 2 2008	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Jun 9 2008	SET FOR ARGUMENT ON Wednesday, October 8, 2008.
Jun 9 2008	Reply of petitioner Vicky S. Crawford filed.
Jul 3 2008	CIRCULATED
Jul 31 2008	Record received from the U.S.C.A. for the 6th Circuit. (1box containing 1 binder)
Aug 7 2008	Record received from U.S.D.C. for the Middle District of Tennessee. (1 box)
Oct 8 2008	Argued. For petitioner: Eric Schnapper, Seattle, Wash.; and Lisa S. Blatt, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.) For respondent: Francis H. Young, Assistant Metropolitan Attorney, Nashville, Tenn.

No. _____

In the
Supreme Court of the United States

VICKY S. CRAWFORD,

Petitioner,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the anti-retaliation provision of section 704(a) of Title VII of the 1964 Civil Rights Act protect a worker from being dismissed because she cooperated with her employer's internal investigation of sexual harassment?

PARTIES

The parties to this action are set forth in the caption.

The original complaint also named as defendants two individuals: Dr. Gene Hughes and Dr. Pedro Garcia. The claims against those individuals were dismissed on grounds not related to the question presented. For that reason they are not respondents in this Court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Vicky S. Crawford respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered on November 14, 2006.

OPINIONS BELOW

The November 14, 2006, opinion of the court of appeals is reported at 211 Fed. Appx. 373 (6th Cir. 2006), and is set out at pp. 3a-10a of the Appendix. The March 1, 2007, order of the court of appeals denying rehearing, which is not officially reported, is set out at pp. 1a-2a of the Appendix. The January 6, 2005, opinion of the district court, which is not officially reported, is set out at pp. 12a-17a of the Appendix.

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on November 14, 2006. A timely petition for rehearing and suggestion for rehearing en banc was denied on March 1, 2007. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 704(a) of Title VII, 42 U.S.C. § 2000e-3(a), provides in pertinent part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or

> because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

The question presented in this case is whether, as the Sixth Circuit held, Title VII permits an employer to dismiss an employee because, in the course of an internal investigation of sexual harassment, the employee objected that she herself had been sexually harassed.

The events giving rise to this action arose out of a sexual harassment investigation conducted in 2002 by the Metropolitan Government of Nashville and Davidson County, Tennessee, referred to collectively by the courts below as "Metro". In the spring of 2002, an attorney at the Metro Legal Department learned that several female employees had expressed concern about being sexually harassed by the employee relations director for the Metro School District, Dr. Gene Hughes. Responsibility for investigating possible sexual harassment by Hughes was assigned to Veronica Frazier, the assistant director for human resources. Frazier contacted employees who had worked with Hughes in the Metro administrative offices, and asked them to come to her office to be interviewed. In the course of those interviews, three female employees, including Petitioner Crawford, described serious acts of sexual harassment by Hughes. (App. 4a-5a).

"Crawford told the investigators that Hughes had sexually harassed her and other employees." (App. 5a). Crawford stated that Hughes "would come to my window and ask to see -- he would say, 'Let me see your titties.'" (J.App. 45). He would "grab his crotch and state 'you know what's up,'" and "would approach her window and put his crotch up to the

window." (*Id.*) On one occasion "Hughes came into her office and she asked him what she could do for him and he grabbed her head and pulled it to his crotch." (*Id.*; see App. 5a n.1). Crawford made clear that she strongly objected to this behavior. On one occasion she "told him to get the hell out of my office." (J.App. 45). Crawford characterized her statements to the investigators as "testimony against" Hughes. (JA 47, 53).

At the time that Crawford spoke to the investigators, she was afraid that if she told them about Hughes' sexual harassment "I would lose my job." (JA 47). Those fears were well founded. Within a few months of taking part in the internal investigation, Crawford was suspended and then fired. The two other women who had complained to investigators about being sexual harassment were also fired. (App. 5a). The investigators concluded that Hughes to some degree had acted improperly, but no disciplinary action was taken against him. (App. 5a).

After filing a timely charge with the EEOC, Crawford commenced this action under Title VII in the United States District Court for the Middle District of Tennessee. Crawford alleged that she had been dismissed in retaliation for having told investigators about being harassed by Hughes. That retaliation, she asserted, violated section 704(a) of Title VII.

Metro moved for summary judgment. It argued, inter alia, that it is entirely lawful to dismiss a woman who during the course of an internal investigation complains about sexual harassment. Providing information to a company's own investigators, Metro contended, is not "protected activity" covered by section 704(a), even if the information consists--as

here--of an allegation that the employee had been sexually harassed.[1]

The District Court dismissed the complaint, holding that participation in an employer's internal investigation is not protected by section 704(a). To be protected by section 704(a), it reasoned, a sexual harassment victim must on her own initiative file some sort of formal complaint. Once an employer has initiated an investigation, mere witnesses--even witnesses who object to having been sexually harassed--are outside the protection of section 704(a).

> [P]rotected activity under Title VII does not include participation in internal investigations. . . . In the cases relied upon by Plaintiff . . . the plaintiffs initiated investigations by filing complaints or reporting allegedly unlawful conduct. Here, Plaintiff merely answered questions by investigators in an already-pending internal investigation, initiated by someone else. In her Complaint, Plaintiff alleges that she fully cooperated with Metro's investigation, that

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[1] Motion for Summary Judgment, p. 7 (JA 39):

> Plaintiff's statements to the sexual harassment investigators do not constitute "protected activity." Plaintiff contends that the statements she made to [the sexual harassment investigators] about Gene Hughes' inappropriate behavior are the "protected activity" which prompted the alleged retaliation against her. However, since she gave these statements during an in-house sexual harassment investigation - which was completed way before she or anyone else filed a formal charge of discrimination with the EEOC - these statements are not "protected activity" as a matter of law.

> she participated in the investigation, that she was questioned by investigators, that she testified unfavorably to Dr. Hughes. There is no allegation that she instigated or initiated any complaint.

(App. 15a-17a). In this case, since the investigation was initiated by the Metro's own Legal Department, all of the sexual harassment victims were merely cooperating witnesses, and thus all the victims could be lawfully dismissed for complaining that they had been harassed.

The court of appeals affirmed. It held, first, that complaining about sexual harassment in response to an internal investigation is not protected by the opposition clause of section 704(a), which forbids retaliation because an employee "has opposed" a violation of Title VII.

> Crawford's actions do not constitute opposition under the meaning of the opposition clause. . . . The general idea is that Title VII "demands active, consisting 'opposing' activities to warrant . . . protection against retaliation." *Bell v. Safety Grooving and Grinding, LP*, 107 F. App'x 607, 610 (6th Cir. 2004).
>
> Crawford's actions consisted of cooperating with Metro's investigation into Hughes by appearing for questioning at the request of Frazier and, in response to Frazier's questions, relating unfavorable information about Hughes. Crawford does not claim to have instigated or initiated any complaint prior to her participation in the investigation, nor did she take any further action following the investigation and

> prior to her firing. This is not the kind of overt opposition that we have held is required for protection under Title VII.

(App. 7a-8a).

Second, the court of appeals held that complaining about sexual harassment in response to an internal investigation is not protected by the participation clause of section 704(a) which forbids retaliation because an employee "testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title." The participation clause, it held, does not apply until and unless the victim or someone else has first filed a charged with the EEOC itself.

> Crawford's participation in an internal investigation initiated by Metro in the absence of any pending EEOC charge is not protected activity under the participation clause. We have held that "Title VII protects an employee's participation in an employer's internal investigation into allegations of unlawful discrimination where that investigation occurs pursuant to a pending EEOC charge." *Abbot* [*v. Crown Motor Co., Inc.*], 348 F.3d [537,] 543 [6th Cir. 2003)]. In Crawford's case, however, no EEOC charge had been filed at the time of the investigation or prior to her firing; the investigation was internal and was prompted by an informal internal statement.

(App. 8a).

The court of appeals reasoned that applying the protections of section 704(a) to sexual harassment victims who speak out during an internal investigation would actually

deter employers from even conducting investigations of possible sexual harassment.

> The impact of Title VII on an employer can be onerous. By protecting only participation in investigations that occur relative to EEOC proceedings, the participation clause prevents the burden of Title VII from falling on an employer who proactively chooses to launch an internal investigation. Expanding the purview of the participation clause to cover such investigations would simultaneously discourage them.

(App. 10a).

Crawford filed a timely petition for rehearing and for rehearing en banc. The petition was denied on March 1, 2007. (App. 1a-2a).

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS AN ISSUE OF VITAL IMPORTANCE TO THE ADMINISTRATION OF TITLE VII

The Sixth Circuit in this case held that the anti-retaliation provisions in section 704(a) of Title VII do not protect an employee who during the course of an employer's internal investigation complains about sexual harassment. Specifically, the court of appeals held that statements by witnesses during such an internal investigation are not protected either by the opposition clause of section 704(a) (which forbids retaliation because an employee "opposed any" practice prohibited by Title VII) or by the participation clause (which forbids retaliation because an employee

"participated in any manner in an investigation . . . under this title.")

The EEOC emphatically construes section 704(a) in precisely the opposite manner. With regard to the opposition clause, the EEOC Compliance Manual explains:

> Protected activity . . . includes testifying or presenting evidence as part of an internal investigation pertaining to an alleged EEO violation. . . . Because encouraging employers to discover and prevent discriminatory practices in the workplace is a primary objective of Title VII, an employee who assists his/her employer in this endeavor is, by definition, opposing practices made unlawful by Title VII.[2]

The application of section 704(a) to participation in an internal investigation follows from the EEOC's general interpretation of the opposition clause of section 704(a).

> This protection applies if an individual explicitly or implicitly communicates to his or her employer or other covered entity a belief that its activity constitutes a form of employment discrimination that is covered by any of the statutes enforced by EEOC.[3]

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[2] EEOC Compliance Manual, section 915.003, part 2-II(A)(5), available at http://www.eeoc.gov/policy/docs/threshold.html, visited May 23, 2007.

[3] EEOC Compliance Manual, section 915.003, part 8-II(B)(1), available at http://www.eeoc.gov/policy/docs/retal.html, visited May 23, 2007.

The Commission also insists that an employee who cooperates in an internal investigation is protected by the participation clause of section 704(a):

> Participation means taking part in an employment discrimination proceeding. . . . Examples of participation include: . . . [c]ooperating with an internal investigation of alleged discriminatory practices; or . . . [s]erving as a witness in an EEO investigation . . . .[4]

The EEOC has advanced its interpretations of section 704(a) in briefs in the courts of appeals.[5]

This issue is vital to the implementation of Title VII and other federal employment statutes. Although Title VII authorizes aggrieved employees to file suit in federal court, the most important stage of compliance is in the workplace itself. Federal litigation is the enforcement tool of last resort; the overarching purpose of that remedy, and of Title VII, is to induce employers "to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible" unlawful discrimination and its lingering effects. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975). Because the relevant information about discriminatory practices is usually in the hands of an employer's own workers, protecting those workers from

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[4] EEOC, "Retaliation" (undated). This interpretation of section 704(a) and similarly worded anti-retaliation provisions is available at http://www.eeoc.gov/types/retaliation.html, visited May 23, 2007.

[5] *See* nn. 11 and 13, *supra*.

reprisals is critical to the viability of any employer's internal investigation and review process.

An employer's internal processes for investigating and correcting possible violations of Title VII have a particularly central role in the elimination of sexual harassment. In order to strengthen employers' internal processes for dealing with harassment, this Court has interpreted Title VII to impose strict liability on an employer for a supervisor's discriminatory harassment, subject to an affirmative defense designed "to recognize the employer's affirmative obligation to prevent violations and give credit . . . to employers who make reasonable efforts to discharge their duty." *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998). The protections of section 704(a) are particularly critical with regard to claims of sexual or other harassment. In such cases the alleged harasser will predictably be angered by the harassment allegation, most harassment occurs at the hands of supervisors who are well situated to bring about reprisals against cooperating witnesses, and all too often the witness is under the supervision of the alleged harasser.

The EEOC properly regards statements by witnesses as critical to a sexual harassment investigation. The EEOC advises employers conducting internal investigations to identify any such witnesses[6], provides guidance regarding the

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[6] Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (June 6, 1999), part V(C)(1)(e)(i):

> **Questions to Ask the Complainant**:
>
> * * *
>
> --Are there any persons who have relevant information?

questions that should be asked of them[7], and emphasizes the importance of such witnesses in corroborating other

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> Was anyone present when the alleged harassment occurred? Did you tell anyone about it? Did anyone see you immediately after episodes of alleged harassment?
> --Did the person who harassed you harass anyone else? Do you know whether anyone complained about harassment by that person?

Available at http://www.eeoc.gov/policy/docs/harassment.html, visited May 23, 2007.

[7] *Id.*:

> **Questions to Ask Third Parties**:
> --What did you see or hear? When did this occur? Describe the alleged harasser's behavior toward the complainant and toward others in the workplace.
> --What did the complaint tell you? When did s/he tell you this?
> --Do you know of any other relevant information?
> --Are there other persons who have relevant information?

testimony.[8] Both before[9] and after this Court's decisions in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), the EEOC has emphasized the particular importance of preventing retaliation against witnesses from occurring in connection with an investigation of sexual harassment. The EEOC's current Policy Guidance admonishes employers to assure "that employees who . . . provide information related to such complaints will be protected against retaliation."[10]

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[8] *Id.* at part V(C)(1)(e)(ii):

> -- **Corroboration**: Is there *witness testimony* (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at around the time that they occurred) . . . ?
> -- **Past record**: Did the alleged harasser have a history of similar behavior in the past?

[9] Policy Guidance on Current Issues of Sexual Harassment, No. N-915-050 (March 19, 1990), part E(1) (employer must provide "protection of victims and witnesses against retaliation.") Available at http://www.eeoc.gov/policy/docs/currentissues.html, visited on May 23, 2007.

Policy Guidance on Current Issues of Sexual Harassment, No. N-915.030 (October 25, 1988), p.28 (employer must provide "protection of victims and witnesses against retaliation.") This Policy Guidance is quoted in *Newsday, Inc. v. Long Island Typographical Union, No. 915, CWA*, 915 F.2d 840, 845 (2d Cir. 1990).

[10] Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (No. 915.002, June 6, 1999),

The EEOC, which has the primary responsibility for enforcing Title VII, has also concluded that its *own* ability to meet those statutory responsibilities would be seriously impeded if internal-investigation witnesses were not protected by section 704(a).

> Now that the Supreme Court [in *Faragher* and *Ellerth*] has made participation in an employer's internal complaint procedure a virtual prerequisite to recovery, employees involved in internal investigations are playing an essential role in the EEOC's enforcement efforts. If employees are too intimidated to participate freely in internal investigations, the EEOC's ability to enforce Title VII would be seriously compromised.[11]

If in the course of an employer's sexual harassment investigation a harassment victim refuses to answer questions or fails to disclose that she has been harassed, that lack of cooperation may ultimately preclude the EEOC as well as the victim from thereafter obtaining relief under Title VII.

> Given the new emphasis on internal complaint procedures, participation in an internal investigation has essentially become a prerequisite for recovery . . . . Unless an employee has complained to her employer . . . her eventual EEOC charge may be ineffective as a means to remedy illegal harassment. To the extent that the participation clause seeks to

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part V(C)(1). Available at http://www.eeoc.gov/policy/docs/harassment.html, visited May 23, 2007.

[11] Brief of the EEOC as Appellant, *EEOC v. Total Systems Services, Inc.*, 221 F.3d 1171 (11th Cir. 2000), No. 99-13196-JJ, pp. 17-18.

> protect the EEOC's ability to enforce Title VII, the new legal regime mandates that its protections now extend to participation in an internal investigation of a supervisor's sexual harassment. Absent such protection, employees may be too intimidated to come forward first to their employer and then to the EEOC, and the EEOC's ability to enforce the statute may thereby be compromised.[12]

"Only by making it impossible for employers legally to retaliate against employees who participate in internal investigations can this Court fulfill Title VII's mandate of fully protecting access to EEOC's enforcement machinery."[13]

The Department of Labor has similarly observed regarding claims under the Fair Labor Standards Act that an anti-retaliation provision would often be ineffective if its

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[12] *Id.* at 12-13.

[13] *Id.*at 14. See Reply Brief of the Equal Employment Opportunity Commission as Appellant, *EEOC v. Total Systems Services, Inc.*, 221 F.3d 1171 (11th Cir. 2000), No. 99-13196-JJ, pp. 3-4 ("The new importance that *Faragher* places upon internal investigations essentially elevates participation in such investigations into a procedural prerequisite for Title VII enforcement. . . . Especially when the issue under investigation is sexual harassment by a supervisor, employees need all the reassurance that they can get before they will come forward."), 6 ("Coverage under the participation clause would remove fear of retaliation as an impediment to participation in an employer's internal investigation of sexual harassment. It would, therefore, promote enforcement of Title VII by removing a potential barrier to the EEOC's eventual involvement.")

protections did not come into play until *after* a lawsuit (or, in this case, an EEOC charge) was filed.

> [Such a limitation] will allow an employer, on learning that it is about to be sued for FLSA violations, to retaliate against employees with information needed for the lawsuit. That result . . . can be expected "to dry up legitimate sources of information . . . , to impair the functioning of the machinery provided for the vindication of the employees' rights and, probably, to restrain employees in the exercise of their protected rights." *NLRB v. Electro Motive Mfg. Co.*, 389 F.2d 61, 62 (4th Cir. 1968).[14]

II. THE DECISION OF THE SIXTH CIRCUIT IS IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS

In the other courts of appeals, unlike the Sixth Circuit, the EEOC's interpretation of section 704(a) is largely unquestioned.

In *Cardenas v. Massey*, 269 F.3d 251 (3d Cir. 2001), the plaintiff alleged that he had been retaliated against because he "offered to support [another individual's] EEO complaint" and supported the complaint of another. 269 F.3d at 260. The plaintiff had merely offered to be a witness in connection

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[14]Brief for the Secretary of Labor as Amicus Curiae, *Ball v. Memphis Bar-B-Q Company, Inc.*, 228 F.3d 360 (4th Cir. 2000), No. 9901261, pp. 10-11 (1999 WL 33636931).

with an in-house investigation.[15] The district court dismissed the retaliation claim on the ground that the plaintiff "had not shown that he engaged in a protected activity." 269 F.3d at 263. The Third Circuit reversed, holding that the plaintiff's "cooperation in the complaints of . . . other individuals" constituted protected activity." *Id.*

In *Evans v. City of Houston*, 246 F.3d 344 (5th Cir. 2001), the plaintiff alleged that he had been retaliated against for testifying at the grievance hearing of another city employee; Evans had not volunteered to appear, but was required by subpoena to do so. The Fifth Circuit held that that testimony was protected activity under section 704(a), rejecting the city's contention that "[i]nternal grievance procedures are not 'protected activities' under Title VII." 246 F.3d at 352 n. 7.

> Evans was subpoenaed to testify at [the] grievance hearing . . . and Evans did appear and testify. The grievance hearing concerned [the other worker's] Title VII claims of discrimination. . . . If an employee has "'made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing' under Title VII," the employee has engaged in a protected activity. The district court was

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[15] "[The person who filed the in-house complaint] told [a manager] that Cardenas had offered to be a witness for [the complainant] regarding [his] pending in-house EEO complaint. [The manager] summoned Cardenas and [another employee] to [his] office, and upon their arrival announced an intention to impose substantial disciplinary sanctions upon Cardenas while vigorously berating him for offering to assist [the complainant]." Brief for Appellant, *Cardenas v. Massey*, No. 00-5225, p. 23. The employer on appeal did not dispute this account of those events.

> therefore correct to find that Evans had [engaged in protected activity.]

246 F.3d at 352-53 (citation omitted).

In *Scott v. County of Ramsey*, 180 F.3d 913 (8th Cir. 1999), the Eighth Circuit upheld a jury verdict finding unlawful retaliation based on the actions of the plaintiff in cooperating with a sexual harassment investigation. "Scott was ordered to give a statement in an internal investigation regarding a sexual harassment claim that had been filed by another . . . deputy." 180 F.3d at 916. "Scott gave a recorded statement . . . that confirmed the inappropriate comments [complained of, and] stated he was sure that [a named supervisor] was aware of the behavior." *Id.* Scott alleged, and the jury found, that he was "terminated in retaliation for participating in a protected activity." *Id.* The Eighth Circuit upheld that finding. In *Hoffman v. Rubin*, 193 F.3d 959, 963-64 (8th Cir. 1999), the Eighth Circuit held that answering questions from "internal-affairs investigators" concerning alleged sexual harassment, and responding to questions from the press about that problem, constituted protected activities. See *Kempcke v. Monsanto Co.*, 132 F.3d 442, 446 (8th Cir. 1998) (providing documents to attorney is protected activity).

In *EEOC v. Total Systems Services, Inc.*, 221 F.3d 1171 (11th Cir. 2000), the Eleventh Circuit concluded that cooperation with an internal investigation is not protected activity within the scope of the participation ~~clause~~, but held that such cooperation could be protected activity under the opposition clause. In the circumstances of that case, however, the court held that the employer's actions were not

motivated by an unlawful purpose.[16] In response to a petition for rehearing, Judge Edmondson, who had authored the original panel decision, emphasized that the panel had held that opposition clause can apply to cooperation with an internal investigation:

> [T]he panel's decision does not hold (nor does it suggest) that a retaliation claim is impossible unless someone has first filed an applicable EEOC complaint. To read the opinion differently is inaccurate. We recognize that a plaintiff--in circumstances similar to those in this case, that is, a private employer's internal investigation with no government involvement--might have protection under Title VII and that this protection would flow from the "opposition clause" of the Act. . . . Applying the law as the panel does, may significantly advance the fulfillment of Title VII's goals by encouraging employers to . . . engage in self-examination, and to resolve-- . . . internally. . . . -- disputes involving claims of discrimination . . . without too much fear (*so long as the employer acts honestly*) of potential, troublesome and costly litigation. . . . An employee who participates in an employer's own internal investigation of discrimination *is* within the scope of the opposition clause and can be protected by the clause: for example, an employer cannot throw up just a pretext and get away with punishing an employee for speaking out.

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[16] The panel concluded the evidence showed that the plaintiff had been dismissed, not for having participated in the internal investigation, but because the employer believed she had lied to the investigators.

240 F.3d at 904-05 (emphasis added). Judge Edmondson's reiteration of the panel holding is regarded is authoritative in the Eleventh Circuit. *E.g., MacLean v. City of St. Petersburg*, 194 F. Supp. 2d 1290, 1298 (M.D.Fla. 2002).

The holding of the Sixth Circuit in the instant case that the opposition clause of section 704(a) protects only "active" opposition (App. 7a) was emphatically rejected by the Seventh Circuit in *McDonnell v. Cisneros*, 84 F.3d 256 (7th Cir. 1996). In *McDonnell* in the plaintiff at issue, Thomas Boockmeier, was retaliated against for simply doing nothing at all. Two female workers, both subordinates of Boockmeier, had filed discrimination charges. A higher ranking official warned the women that if they did not withdraw their charges, the employer would punish Boockmeier "for failing to control his subordinates." *McDonnell v. Cisneros*, 1995 WL 110131 at * 2 (N.D.Ill. 1995); see 84 F.3d at 258. The employer never ordered Boockmeier to direct the women to withdraw the charges, but evidently hoped he would encourage them to do so in order to avoid reprisals. Boockmeier took no action, and the women did not withdraw their complaints. The employer then retaliated against Boockmeier by permanently transferring him from Chicago to Washington, and told Boockmeier the transfer was being imposed because of his failure to persuade the women to do so. 84 F.3d at 258. The Seventh Circuit held that section 704(a) protected even purely passive opposition. Judge Posner explained:

> [Section 704(a)] forbids retaliating against an employee "because he has opposed any practice made an unlawful employment practice" by Title VII. Several courts, including our own, hold that assisting another employee with his (in this case her) discrimination claim, as well as other endeavors to

> obtain an employer's compliance with Title VII, is protected "opposition conduct." . . . It is true that there are cases of *active* opposition. Boockmeier's opposition was *passive*. . . . Passive resistance is a time-honored form of opposition, however, and it would be very odd to suppose that Congress meant a form of behavior that straddles what the cases . . . call "opposition" and "participation" conduct to fall between the stools.

84 F.3d at 262 (emphasis added).

III. THE DECISION OF THE SIXTH CIRCUIT WILL SERIOUSLY IMPEDED ADMINISTRATION OF TITLE VII

The holding of the Sixth Circuit in this case is far more than a rule for deciding Title VII retaliation cases; that holding will predictably shape the actions of the large numbers of employees and employers in Michigan, Ohio, Kentucky and Tennessee. As this Court has expressly recognized, Congress has enacted anti-retaliation statutes because it concluded that employees are likely to refuse to disclose information about violations of federal law if they can be fired or otherwise discriminated against in reprisal. *Burlington Northern and Santa Fe Rwy. Co. v. White*, 126 S. Ct. 2405, 2414 (2006)(Title VII); *Jackson v. Birmingham Bd. of Education*, 544 U.S. 167, 180 (2005) (Title IX); *NLRB v. Scrivener*, 405 U.S. 117, 122 (1972) (NLRA); *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) (FLSA).

Workers of ordinary prudence would be likely to avoid cooperating with a sexual harassment internal investigation if they knew they could be fired for doing so, certain as most

will be that such cooperation will anger the alleged harasser, who usually is a supervisor and who all too often is the witness's own supervisor. "[E]mployees would have a disincentive to cooperate, if their participation in internal investigations is not protected." *EEOC v. Total System Services, Inc.*, 240 F.3d 899, 803 n. 7 (11th Cir. 2001) (Barkett, J., dissenting from denial of en banc rehearing). "Placing a voluntary witness into this kind of legal limbo would impede remedial mechanisms by denying interested parties 'access to the unchilled testimony of witnesses.'" *Jute v. Hamilton Sundstrand Corp.*, 420 F.3d 166, 175 (2d Cir. 2005) (citation omitted).

"If [employers] were permitted to retaliate freely, individuals who witness discrimination would be loath to report it, and all manner of . . . violations might go unremedied as a result." *Jackson v. Birmingham Bd. of Education*, 544 U.S. 167, 180 (2005). Under Title VII whether an employer is legally responsible for sexual or other harassment often turns on whether the employer knew that the harassment was occurring. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 760 (employer liable for negligent failure to correct harassment by co-workers), 765 (employer liable for harassment by supervisor if employer failed to exercise care to correct harassment) (1998). If witnesses to unlawful harassment are unwilling to cooperate with an internal investigation, and the employer as a result is able to show it did not learn of the harassment, both private claimants and the EEOC itself may be unable to obtain redress for that harassment. See *Jackson v. Birmingham Bd. of Education*, 544 U.S. 167, 180 (2005) ("Without protection from retaliation, individuals who witness discrimination would likely not report it, indifference claims would be short-circuited, and the underlying discrimination would go unremedied.") As this case and others like it well illustrate,

many harassment victims who might be reluctant to file formal complaints on their own initiative would be willing to provide candid answers in response to an internal investigation; that often critical source of information would be cut off if cooperation with such an investigation could lawfully lead to dismissal.

The decision below also creates significant and undesirable incentives for those harassment victims who do decide to file some sort of a formal complaint. Because relevant witnesses would have good reason to withhold cooperation from an employer's own internal investigation, a complaint to the employer itself may well be ineffective. Worse yet, if the employer--for want of corroborating information-- does not conclude that harassment occurred, and as a consequence does not take steps to end the harassment, the victim may have no claim, because-- in the absence of that corroboration--the employer's inadequate response may be held reasonable. *E.g., Jackson v. County of Racine*, 474 F.3d 493 (7th Cir. 2007). Given that situation, a harassment victim would be well advised to bypass the employer's own corrective processes and instead proceed at once to file a Title VII charge with the EEOC. Forcing sexual harassment victims to do so, however, would significantly increased the caseload of an already over-burdened EEOC.

Finally, the decision below provides employers with an entirely legal manner in which they can punish, and deter, employees who might provide information that would support sexual harassment claims by their co-workers. There is in the Sixth Circuit today a well-defined window of opportunity during which an employer is free to retaliate against witnesses or potential witnesses; reprisals are entirely lawful until and unless a related Title VII charged is filed with the EEOC or the potential witness files his or her own formal internal

complaint. A witness lawfully dismissed at the internal investigation stage could be unavailable by the time a case gets to trial, other workers--aware of the fate of their colleague--may well be deterred from cooperating at later stages of the Title VII process (even though legal protections would then apply) and the original complaining party will have little ability, reason or standing to try to prove at her own trial that internal-investigation witness was (lawfully) dismissed for a retaliatory purpose.

The Sixth Circuit decision in this case also creates an immediate administrative problem for the EEOC. The EEOC web site (eeoc.gov), which is visited more than 10 million times a year, is a critical source of information for employees. An employee who opens the EEOC home page and clicks on "retaliation" is shown a short summary of employee rights which categorically assures the viewer that he or she cannot be fired or otherwise retaliated against for taking part in an internal investigation.[17] That assurance serves the salutory purpose of encouraging workers to provide information to company officials, cooperation of great importance to sexual harassment investigations under *Faragher* and *Ellerth*.

But for the millions of employees in the Sixth Circuit, that categorical EEOC assurance is now flatly wrong. In regrettably similar language, the EEOC web site assures employees they are protected for "[c]ooperating with an

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[17] EEOC, "Retaliation" (undated). This interpretation of section 704(a) and similarly worded anti-retaliation provisions is available at http://www.eeoc.gov/types/retaliation.html, visited May 23, 2007. *See* text at n. 4, *supra*.

internal investigation"[18], while the opinion below holds, to the contrary, that "cooperation with Metro's investigation . . . is not the kind of overt opposition that we have held is protected under Title VII." (App. ---). Unlike other portions of the EEOC web site, which may be relied on primarily by attorneys or judges, the Commissions's guidance regarding what is and is not protected activity provides essentially legal advice on which employees themselves can and do rely in deciding how to respond to sexual harassment.

In the Sixth Circuit today no responsible attorney or labor union would assure a worker there that he or she cannot lawfully be fired for cooperating with an internal investigation. If, however, the EEOC responds to this problem by deleting participation in internal investigations from its public list of protected activities, workers outside the Sixth Circuit may be needlessly deterred from taking part in those investigations. The EEOC could, of course, provide state-by-state guidance (employees in general would not know in which circuit they are located), distinguishing states in circuits where cooperation is protected from states where cooperation is not protected and from states in which the law may now be unclear. But the resulting crazy-quilt pattern, while accurate, would graphically depict precisely the sort of inter-circuit division which warrants review by this Court.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

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[18] *Id.*

In the alternative, the Solicitor General should be invited to file a brief in this case expressing the views of the United States.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 05-5258

[Filed March 1, 2007]

VICKY S. CRAWFORD,
Plaintiff-Appellant,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,
Defendant-Appellee,

GENE HUGHES, DR., ET AL.,
Defendants.

BEFORE: BOGGS, Chief Judge; DAUGHTREY, Circuit Judge; and MILLS,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of

* Hon. Richard Mills, Senior United States District Judge for the Central District of Illinois, sitting by designation.

this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/

Leonard Green, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 05-5258

[Filed November 14, 2006]

VICKY S. CRAWFORD,
Plaintiff-Appellant,

v.

METROPOLITAN GOVEkNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,
Defendant-Appellee,

GENE HUGHES, DR.; PEDRO GARCIA, DR.,
Defendants.

On Appeal from the United States District Court for the Middle District of Tennessee

Before: BOGGS, Chief Judge; DAUGHTREY, Circuit Judge; MILLS, District Judge.*

* The Honorable Richard Mills, United States District Judge for the Central District of Illinois, sitting by designation.

PER CURIAM. Vicky S. Crawford, a former employee of the Metropolitan Government of Nashville and Davidson County, Tennessee ("Metro"), appeals the district court's grant of summary judgment against her claims for retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"). Because we find that there is no genuine issue of material fact and that Metro is entitled to judgment as a matter of law, we affirm the grant of summary judgment.

I

As this case is before us on an appeal of a grant of summary judgment, we state the facts in the light most favorable to the plaintiff. *See Hopson v. DaimlerChrysler Corp.*, 306 F.3d 427, 432 (6th Cir. 2002).

Vicky Crawford had worked for Metro for thirty years before being fired in November of 2002. Crawford alleges that the situation that led to her firing arose in the fall of 2001, when Metro hired Dr. Gene Hughes as the employee relations director for the Metro School District. As employee relations director, Hughes was responsible for, *inter alia,* investigating complaints of discrimination. In May 2002, an attorney for the Metro Legal Department contacted the Human Resources Department after Jennifer Bozeman, an attorney with Metro Legal, learned from another Metro employee that there were several employees within the administrative offices that had expressed concern about specific incidents of inappropriate behavior by Hughes. Because Hughes would normally have been responsible for investigating complaints of sexual harassment, this complaint was instead brought to the attention of Dr. Pedro Garcia, the director of schools. Metro then assigned Veronica Frazier, the assistant director of human resources, to investigate the

complaint. In carrying out the investigation, Frazier contacted employees who worked with Hughes in the Metro administrative offices and asked them to come to her office so that she could interview them. One of the employees so approached was Crawford.

In July 2002, Crawford went to the legal department as requested and Frazier questioned her about Hughes. Crawford told the investigators that Hughes had sexually harassed her and other employees.[1] According to Crawford, she believed that she was exercising her rights under federal law when she informed Frazier of Hughes's actions. Frazier's investigation concluded that Hughes had engaged in inappropriate and unprofessional behavior, though not to the extent of Crawford's allegations. It appears that no disciplinary actions was taken against Hughes; the investigators did recommend training and education for the staff.

According to Crawford, during the investigation, three employees made statements that Hughes had engaged in sexually inappropriate conduct, and after the sexual harassment investigation, these three employees were immediately investigated on other grounds and all promptly discharged. Crawford herself was terminated in January 2003 after having been accused of embezzlement and drug use, charges which she states were "ultimately found to be

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[1] Specifically, Crawford stated that Hughes "had asked to see her titties on numerous occasions," that she would say "Hey Dr. Hughes, What's up?" and he would "grab his crotch and state 'you know what's up,'" that he would "approach her window and put his crotch up to the window and ask to see her titties all at the same time," and that one time, "Hughes came into her office and she asked him what she could do for him and he grabbed her head and pulled it to his crotch." *Br. of Appellant* at 7. *See also* JA 44-45.

unfounded." In June 2003, Crawford filed a charge of discrimination with the EEOC alleging retaliation, and after receiving her notice of right to sue, she brought this suit.

II

We review a district court's grant of summary judgment *de novo,* using the same Rule 56(c) standard as the district court. *Hansard v. Barrett,* 980 F.2d 1059, 1061 (6th Cir. 1992). Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Meyers v. Columbia/HCA Healthcare Corp.*, 341 F.3d 461, 466 (6th Cir. 2003). In deciding a motion for summary judgment, we must view the factual evidence and draw all reasonable inferences in favor of the nonmoving party. *Ibid.*; *Hopson v. DaimlerChrysler Corp.*, 306 F.3d 427, 432 (6th Cir. 2002).

III

Title VII provides that "[i]t shall be an unlawful employment practice for an employer to discriminate against any of [its] employees . . . because [the employee] has opposed any practice made an unlawful employment practice by this subchapter ["the opposition clause"], or because [the employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter ["the participation clause"]." 42 U.S.C. § 2000e-3(a). To establish a *prima facie* case of unlawful retaliation under Title VII, Crawford must demonstrate by a preponderance of the evidence that: "(1) [she] engaged in activity that Title VII protects; (2) defendant

knew that [she] engaged in this protected activity; (3) the defendant subsequently took an employment action adverse to the plaintiff; (4) a causal connection between the protected activity and the adverse employment action exists." *Abbott v. Crown Motor Co., Inc.*, 348 F.3d 537, 542 (6th Cir. 2003). Upon appeal, Crawford claims that her actions during the internal investigation constitute both *opposition* to a practice made unlawful by Title VII and *participation* in an investigation under Title VII, and that she therefore engaged in activity that Title VII protects. As did the district court, we hold that precedent compels a contrary conclusion.

First, Crawford's actions do not constitute opposition under the meaning of the opposition clause. We have enumerated the types of activities that constitute opposition under Title VII: "complaining to anyone (management, unions, other employees, or newspapers) about allegedly unlawful practices; refusing to obey an order because the worker thinks it is unlawful under Title VII; and opposing unlawful acts by persons other than the employer – e.g., former employers, union, and co-workers." *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 579 (6th Cir. 2000). The general idea is that Title VII "demands active, consistent 'Opposing' activities to warrant . . . protection against retaliation." *Bell v. Safety Grooving and Grinding, LP*, 107 F. App'x 607, 610 (6th Cir. 2004).

Crawford's actions consisted of cooperating with Metro's investigation into Hughes by appearing for questioning at the request of Frazier and, in response to Frazier's questions, relating unfavorable information about Hughes. Crawford does not claim to have instigated or initiated any complaint prior to her participation in the investigation, nor did she take any further action following the investigation and prior to her

firing. This is not the kind of overt opposition that we have held is required for protection under Title VII.

Second, Crawford's participation in an internal investigation initiated by Metro in the absence of any pending EEOC charge is not a protected activity under the participation clause. We have held that "Title VII protects an employee's participation in an employer's internal investigation into allegations of unlawful discrimination where that investigation occurs pursuant to a pending EEOC charge." *Abbott,* 348 F.3d at 543. In Crawford's case, however, no EEOC charge had been filed at the time of the investigation or prior to her firing; the investigation was internal and was prompted by an informal internal statement. Courts have generally held that the participation clause does not protect "an employee's participation 'in an employer's internal, in-house investigation, conducted apart from a formal charge with the EEOC'; at a minimum, an employee must have filed a charge with the EEOC or otherwise instigated proceedings under Title VII." *Ibid.* (quoting *EEOC v. Total Sys. Serv., Inc.,* 221 F.3d 1171, 1174 n.2 (11th Cir. 2000)); *Brower v. Runyon,* 178 F.3d 1002, 1006 (8th Cir. 1999); *Vasconcelos v. Meese,* 907 F.2d 111, 113 (9th Cir. 1990); *Goldberg v. Media General, Inc.,* 2003 U.S. Dist. LEXIS 13961, 2003 WL 21920923 at *3 (E.D, Tenn. June 18, 2003).

Crawford argues that we should break from the general trend requiring a formal EEOC charge to have been filed or the machinery of Title VII otherwise invoked before the participation clause takes effect. Crawford points to the Supreme Court's decision in *Faragher v. City of Boca Raton,* 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998), which created an affirmative defense against an employer's vicarious liability for sexual harassment by its employees

when: (1) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Id.* at 805-07. Crawford hypothesizes that after *Faragher*, an employer could implement formal sexual harassment policies and reporting requirements, investigate complaints made to management, and then such investigations would serve as an affirmative defense to vicarious liability arising out of claims of sexual harassment. She then argues that if the participation clause does not protect participation in internal investigations made in the absence of an EEOC charge, employees called in such investigations will know that they may be fired if they testify negatively, and will stay silent. She concludes that employers, lacking corroborating witnesses, will not take action to remedy sexual harassment, while being simultaneously shielded from vicarious liability by the *Faragher* affirmative defense.

As an initial matter, this foreboding scenario is predicated upon a lax reading of *Faragher*. In order to be entitled to an affirmative defense, an employer must exercise "reasonable care." *Ibid.* Certainly, a policy or practice of firing a person who testified negatively during an investigation into complaints of sexual harassment would not be "reasonable." Courts have held that an anti-harassment policy designed to deter sexual harassment can help an employer meet its burden as to the first element of the *Faragher* test only if the policy is "both reasonably designed and reasonably effectual" and not administered "in bad faith." *See, e.g., Brown v. Perry*, 184 F.3d 388, 396 (4th Cir. 1999). A policy of firing any witness that testified negatively during an internal investigation would certainly constitute bad faith; even an

instance of an allegedly unjustified firing would put the *Faragher* defense at risk.

This court has stated that the purpose of Title VII's participation clause "is to protect access to the machinery available to seek redress for civil rights violations and to protect the operation of that machinery once it has been engaged. Accordingly, any activity by the employee prior to the instigation of statutory proceedings is to be considered pursuant to the opposition clause." *Booker v. Brown and Williamson Tobacco Co., Inc.*, 879 F.2d 1304, 1313 (6th Cir. 1989). The impact of Title VII on an employer can be onerous. By protecting only participation in investigations that occur relative to EEOC proceedings, the participation clause prevents the burden of Title VII from falling on an employer who proactively chooses to launch an internal investigation. Expanding the purview of the participation clause to cover such investigations would simultaneously discourage them. We will not alter this limit delineated by the language of Title VII and recognized by this court and others.

IV

Accordingly, for the reasons set out above, we AFFIRM the district court's grant of summary judgment.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE AT NASHVILLE

No. 3:03-0996

[Filed January 6, 2005]

VICKY S. CRAWFORD	)
	)
v.	)
	)
THE METROPOLITAN GOVERNMENT OF NASHVILLE/DAVIDSON COUNTY, TENNESSEE	)

JUDGE CAMPBELL

ORDER

Pending before the Court is Defendant's Motion for Summary Judgment (Docket No. 51). For the reasons stated in the accompanying Memorandum, Defendant's Motion is GRANTED, and this action is DISMISSED. The jury trial set for May 3, 2005, and file pretrial conference set for April 25, 2005, are canceled.

IT IS SO ORDERED.

/s/
TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE AT NASHVILLE

No. 3:03-0996

[Filed January 6, 2005]

VICKY S. CRAWFORD	)
	)
v.	)
	)
THE METROPOLITAN GOVERNMENT OF NASHVILLE/DAVIDSON COUNTY, TENNESSEE	)

JUDGE CAMPBELL

MEMORANDUM

Pending before the Court is Defendant's Motion for Summary Judgment (Docket No. 51). For the reasons stated herein, Defendant's Motion is GRANTED, and this action is DISMISSED.

FACTS

Defendant Metropolitan Government of Nashville/Davidson County ("Metro") is the sole remaining Defendant in this action. The three remaining claims against Metro are Plaintiff's Title VII and THRA retaliation claims and Plaintiff's Whistleblower Act claim. *See* Docket No. 23 (dismissing Plaintiff's sexual harassment claims and all claims against Defendant Garcia).

Plaintiff alleges that she was an employee of Metro for more than 30 years as a payroll coordinator. She asserts that, in the fall of 2002, a potential sexual harassment complaint arose against Dr. Gene Hughes, then Director of Employee Relations for the Metro Public School System. Plaintiff contends that, in the course of the internal investigation of the complaint against Dr. Hughes, Metro officials questioned Plaintiff concerning her knowledge of any inappropriate physical conduct or behavior by Dr. Hughes. Plaintiff claims that she informed the investigators of highly inappropriate words and actions by Dr. Hughes.

Plaintiff alleges that, in retaliation for her cooperation and participation in the investigation of Dr. Hughes, Defendant Metro suspended and ultimately terminated her from her job. Plaintiff asserts that she was fired in retaliation for exercising protective rights, in violation of Title VII and the THRA. In addition, Plaintiff contends that the actions of the Defendants violated Tennessee's Whistleblower Act.

Defendant Metro has moved for summary judgment, contending that Plaintiff did not participate in "protected activity" under Title VII and the THRA and, therefore, cannot establish a retaliation claim. Defendant also asserts that Plaintiff cannot show that the persons making the decision to

suspend and then terminate her employment were aware of her statements to the sexual harassment investigators. Finally, Defendant argues that, even if Plaintiff could establish a *prima facie* retaliation claim, Defendant had legitimate, nondiscriminatory reasons for its actions, which Plaintiff cannot show to be pretextual.

SUMMARY JUDGMENT

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Meyers v. Columbia/HCA Healthcare Corp.*, 341 F.3d 461, 466 (6th Cir. 2003). In deciding a motion for summary judgment, the court must view the factual evidence and draw all reasonable inferences in favor of the nonmoving party. *Id.; Hopson v. DaimlerChrysler Corp.*, 306 F.3d 427, 432 (6th Cir. 2002).

To prevail, the non-movant must produce specific evidence that demonstrates there is a genuine issue of material fact for trial. *Meyers*, 341 F.3d at 466. A mere scintilla of evidence is insufficient; there must be evidence on which the jury could reasonably find for the non-movant. *Id.* The non-moving party may not rest on mere allegations but must set forth specific facts showing that there is a genuine issue for trial. *Hopson*, 306 F.3d at 432.

TITLE VII AND THE THRA

In order to establish a claim for retaliation, Plaintiff must show that (1) she engaged in protected activity; (2) Metro knew that she engaged in this protected activity; (3) Metro

subsequently took an employment action adverse to Plaintiff; and (4) a causal connection between the protected activity and the adverse employment action exists. *Abbott v. Crown Motor Co., Inc.*, 348 F.3d 537, 542 (6th Cir. 2003).

Defendant first contends that Plaintiff cannot establish the first element of her retaliation claim because Plaintiff's statements to Metro's internal investigators concerning the alleged sexual harassment were not "protected activity" as that term applies under Title VII and the THRA.[1]

Title VII protects an employee's participation in any manner in an investigation, proceeding or hearing under Title VII. 42 U.S.C. § 2000e-3(a). The Sixth Circuit has held that "Title VII protects an employee's participation in an employer's internal investigation into allegations of unlawful discrimination *where that investigation occurs pursuant to a pending EEOC charge." Abbott,* 348 F.3d at 543 (emphasis added). Other courts have also held that protected activity under Title VII does not include participation in internal investigations. *Goldberg v. Media General, Inc.*, 2003 WL 21920923 at * 3 (E.D. Tenn. June 18, 2003) and cases cited therein; *Equal Employment Opportunity Comm'n v. Total System Servs., Inc.*, 221 F.3d 1171, 1174 (11th Cir. 2000) (Title VII does not include participating in internal, in-house investigation apart from formal charge with EEOC); *Metzger v. City of Leawood*, 144 F. Supp.2d 1225, 1258 (D. Kan. 2001) (same).

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[1] The THRA provision regarding "protected activity" mirrors that of Title VII and, thus, will be analyzed in the same way. Tenn. Code Ann. § 4-21-301(1).

The cases relied upon by Plaintiff on this issue are distinguishable because they all dealt with the "opposition" clause of the statute; that is, the part that prohibits retaliation for opposing a practice made unlawful by the statute. In the cases relied upon by Plaintiff, *Booker v. Brown & Williamson Tobacco Co., Inc.*, 879 F.2d 1304 (6th Cir. 1989),[2] *Warren v. Ohio Dept. of Public Safety*, 2001 WL 1216979 (6th Cir. Oct. 3, 2001),[3] *Johnson v: University of Cincinnati*, 215 F.3d 561 (6th Cir.2000),[4] and *Mulvin v. City of Sandusky*, 320 F. Supp.2d 627 (N.D. Ohio 2004),[5] the plaintiffs initiated investigations by filing complaints or reporting allegedly unlawful conduct. Here, Plaintiff merely answered questions by investigators in an already-pending internal investigation, initiated by someone else. In her Complaint, Plaintiff alleges that she fully cooperated with Metro's investigation, that she participated in the investigation, that she was questioned by the investigators, that she testified unfavorably to Dr. Hughes. There is no allegation that she instigated or initiated any

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[2] In *Booker*, the court actually held that instigation of proceedings leading to the filing of a complaint or a charge, including a visit to a government agency to inquire about filing a charge, is a prerequisite to protection under the participation clause. *Booker*, 879 F.2d at 1313.

[3] The *Warren* court found it unnecessary to decide whether an internal investigation is protected activity under the participation clause. *Warren*, 2001 WL 1216979 at ** 4.

[4] In *Johnson*, the court held that to establish a claim of retaliation under the participation clause, the plaintiff had to show that the defendants discharged him because he filed a claim with the EEOC. *Johnson*, 215 F.3d at 581.

[5] *Mulvin* is the only one of these cases decided after *Abbott* and *Mulvin* does not mention the participation clause.

complaint. Her conduct falls under, if anything, the purview of the participation clause, not the opposition clause.

For these reasons, Plaintiff cannot establish that she engaged in protected activity under Title VII and the THRA. Thus, she cannot establish a retaliation claim under those statutes. The Court need not address Defendant's other arguments concerning these claims.

WHISTLEBLOWER ACT

Having dismissed Plaintiff's federal law claim, the Court declines to exercise its supplemental jurisdiction over Plaintiff's state law claim, 28 U.S.C. § 1367(c)(3), and the Whistleblower Act claim is DISMISSED without prejudice.

CONCLUSION

For the reasons explained above, Defendant's Motion for Summary Judgment (Docket No. 51) is GRANTED, and this action is DISMISSED. The jury trial set for May 3, 2005, and the pretrial conference set for April 25, 2005, are canceled.

IT IS SO ORDERED.

/s/
TODD J. CAMPBELL
UNITED STATES DISTRICT JUDGE

No. 06-1595

FILED
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SUPREME COURT, U.S.

In The

Supreme Court of the United States

VICKY S. CRAWFORD,

Petitioner,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In order to come under the scope of the "opposition clause" in a Title VII retaliation claim, does a plaintiff have to actively "oppose" what she perceives to be an unlawful employment practice? The answer is an unqualified "yes."

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STATEMENT OF THE CASE

Respondent, the Metropolitan Government of Nashville and Davidson County, Tennessee ("Metropolitan Government") adopts and incorporates by reference the Sixth Circuit's recitation of the facts. (Crawford App. 4a-6a).[1] Additional salient facts are as follows.

Ms. Crawford was interviewed by the Metropolitan Government's Human Resources Department in-house sexual harassment investigators on July 22, 2002, in connection with a sexual harassment complaint made by someone else. App. 5-6. Prior to that meeting with investigators, Ms. Crawford did not even know that a sexual harassment investigation was underway. App. 6. She had no idea why she was summoned to Human Resources. *Id.*

The sexual harassment investigation was concluded by September 13, 2002, the date that investigator Veronica Frazier issued her Fact-Finding Report. App. 8.

As a result of information obtained during the course of the sexual harassment investigation, Ms. Frazier sent a September 13, 2002 letter to Kim McDoniel, the head of the Internal Audit Division of the Department of Finance of the Metropolitan Government. App. 18. This letter outlined some concerns regarding the business practices of the school system's Payroll Division, headed by Ms. Crawford, about which Ms. Frazier had learned during the sexual harassment investigation.

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[1] Ms. Crawford was actually terminated on January 6, 2003, not in November 2002. App. 26. Also, Veronica Frazier interviewed Ms. Crawford at the Human Resources Department, not the Legal Department. App. 4-5.

Based on this letter and other complaints about the operation of the Payroll Division, an investigation of the Payroll Division was commenced which resulted in Ms. Crawford being placed on administrative leave on November 7, 2002, and being charged with numerous instances of misconduct. The charges are described in a December 4, 2002 letter to Ms. Crawford. App. 20. The problems included the mishandling of employee contributions to retirement plans and payments to insurance companies, mishandling of court garnishments, and failure to timely file federal tax returns for the school system. *Id.*

A hearing was conducted by Chris Henson, the Assistant Superintendent for Business and Facility Services, on December 12, 2004, at which Ms. Crawford appeared and was represented by counsel. App. 25. Ms. Crawford presented little defense or explanation to the charges. *Id.* As a result, Mr. Henson decided to terminate Ms. Crawford's employment on January 6, 2003. App. 26.

Ms. Crawford appealed Mr. Henson's decision to the Director of Schools, Dr. Pedro Garcia. Dr. Garcia held a hearing on February 6, 2003, at which Ms. Crawford appeared and was represented by counsel. App. 40. After hearing evidence put on by the school administration and by Ms. Crawford, on March 31, 2003 Dr. Garcia issued his 13-page decision finding Mr. Henson's termination of Ms. Crawford's employment to be justified. App. 40-41.

Nearly three months later, Ms. Crawford filed her EEOC Charge of Discrimination, on June 24, 2003. App. 42-43. In this document she claims she was retaliated against because she "participat[ed] in a sexual harassment

investigation" in June 2002.[2] *Id.* On September 10, 2003, the EEOC concluded its investigation and it issued a "Dismissal and Notice of Right to Sue" letter, indicating it was unable to conclude that any of Ms. Crawford's rights under Title VII had been violated. App. 44-46.

These facts provide the "big picture" of the events which led to the termination of Ms. Crawford's employment. It is easy to lose sight of the fact that she was terminated for multiple instances of serious neglect of duty, if the discussion focuses on the policy arguments and the salacious facts she presents in her Petition (this case never progressed to the point where the Metropolitan Government was required to controvert Ms. Crawford's attention-grabbing facts).

SUMMARY OF ARGUMENT

The leadoff section of Ms. Crawford's petition contains an "extrastatutory policy argument" urging the Court to give deference to the EEOC's interpretation of Title VII as contained in its Compliance Manual, in its pronouncements of Policy Guidance, and in two briefs the EEOC filed in a single Eleventh Circuit case which it lost.[3] *See*, *Ledbetter v. Goodyear Tire and Rubber, Co., Inc.*, 127 S.Ct. 2162, 2176 (2007) (rejecting "extrastatutory policy arguments" in a Title VII case). However, in

[2] Ms. Crawford was off by a month. At her deposition she agreed the date of her interview was July 22, 2002. App. 5-6.

[3] The case the EEOC lost which holds against Ms. Crawford but upon which she has relied both here and below is *EEOC v. Total System Services, Inc.*, 221 F.3d 1171 (11th Cir. 2000), *reh. en banc den.*, 240 F.3d 899 (2001)

numerous decisions this Court has declined to defer to the EEOC's interpretations of Title VII, noting that administrative agencies have no special claim to deference in their interpretation of statutes or this Court's decisions.

Alternatively, Ms. Crawford's suggestion that the Court defer to the EEOC's policy pronouncements and adjudicatory positions is a path fraught with peril for her. Assuming *arguendo* this Court were to defer to the EEOC, presumably such deference would also extend to agency decisions unfavorable to Ms. Crawford, like the EEOC's finding in this very case. After thoroughly investigating the very claims that are the subject of this case, the EEOC was unable to conclude that Ms. Crawford's Title VII rights had been violated. App. 44-46. Surely Ms. Crawford's "deference" argument applies equally to the EEOC's finding of no discrimination in this case. What is good for the goose is good for the gander.

Ms. Crawford next attempts to show a conflict between the circuits regarding the type of conduct required to constitute protected "opposition activity" under Title VII. However, she overstates the holdings of the cases she cites, in an attempt to manufacture a conflict between the circuits. The law cited by the District Court and the Sixth Circuit is clear: participation in an in-house sexual harassment investigation prior to the commencement of an EEOC proceeding is not a protected activity under Title VII's "participation clause." Further, Ms. Crawford's conduct in this case does not rise to the level of "opposition" activity under Title VII.

The third section of Ms. Crawford's petition repeats the policy arguments of the first section, in an overly dramatic prognostication of supposedly dire implications

of the Sixth Circuit's decision. The hyperbole riddling this section undercuts its impact. The doomsday scenario Ms. Crawford paints emanates from a worldview in which all employees are victims, and all employers are intent on retaliation. The Court should give short shrift to these arguments.

REASONS FOR DENYING REVIEW

I. THE COURT SHOULD DECLINE TO DEFER TO THE EEOC'S POLICY PRONOUNCMENTS AND ADJUDICATORY POSITIONS

In a recent Title VII case, the Court reiterated the point that it is not bound by an administrative agency's interpretations of federal law, nor is it bound by the agency's adjudicatory positions taken in prior litigation. *Ledbetter*, 127 S.Ct. at 2177, n.11; *See National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 111, n.6 (2002). Administrative agencies have no special claim to deference in their interpretations of Supreme Court decisions. *Ledbetter*, 127 S.Ct. at 2177, n.11; *Reno v. Bossier Parish School Bd.*, 528 U.S. 320, 336 n.5 (2000). In *Ledbetter*, the Court did not find any ambiguity in the statute itself. This is significant because Ms. Ledbetter argued that purported ambiguity in the statute is what called for deference to the EEOC's Compliance Manual in the first place. *Ledbetter*, 127 S.Ct. at 2177, n.11.

There is no ambiguity in this case either. This case involves the same statute at issue in *Ledbetter* (Title VII). The key language is found at 42 U.S.C. § 2000e-3(a) which provides, in pertinent part:

> It shall be an unlawful employment practice for an employer to discriminate against any of [its] employees . . . because [the employee] has **opposed** any practice made an unlawful employment practice by this subchapter, or because [the employee] has made a charge, testified, assisted or **participated** in any manner in an investigation, proceeding or hearing **under this subchapter**. (Emphasis added).

The circuits are unanimous that participation in an in-house sexual harassment investigation, not undertaken while any EEOC charge is pending, is not a "protected activity" under Title VII. *Abbott v. Crown Motor Co., Inc.*, 348 F.3d 537, 543 (6th Cir. 2003); *EEOC v. Total System Services, Inc.* 221 F.3d 1171, 1174 (11th Cir. 2000); *Brower v. Runyon*, 178 F.3d 1002, 1005-06 (8th Cir. 1999); *Vasconcelos v. Meese*, 907 F.2d 111, 113 (9th Cir. 1990). All circuit courts which have directly considered the issue have concluded that the protected activity of "participation in an investigation . . . under this subchapter" means just what it says – that the federal remedies afforded by Title VII only protect participation in an investigation if it was conducted pursuant to federal law (i.e. – pursuant to an investigation, proceeding or hearing prompted by a complainant invoking Title VII rights).

Since day one, when she filed her EEOC Charge of Discrimination, Ms. Crawford has contended that the alleged retaliation resulted from her **participation** in an in-house sexual harassment investigation, which had long since concluded by the time she filed her EEOC charge. App. 43. It was only after receiving the Metropolitan Government's summary judgment motion raising this issue that Ms. Crawford had the revelation that her

statements during her July 22, 2002 interview had magically become "opposition" activity under Title VII:

Ms. Crawford asks the Court to give "deference" to the EEOC's pronouncements in its Compliance Manual, its statements of Policy Guidance, and the positions it has advocated in appellate briefs. However, this "deference" is a two-edged sword for Ms. Crawford. Surely Ms. Crawford would agree that any such deference should be accorded equally across the entire spectrum of EEOC activity. Assuming *arguendo* the Court was to give deference to the EEOC's policy pronouncements, then the Court should also give deference to the EEOC's specific finding in this very case that, after a thorough investigation, it was unable to conclude that Ms. Crawford's Title VII rights had been violated. App. 45. In fact, one could argue that specific agency findings in a given case – made after a thorough agency investigation – should be accorded **more** deference than broad agency pronouncements of policy or agency interpretations of statutes.

If Ms. Crawford really wants deference, then that deference should apply to agency pronouncements both favorable and unfavorable to her.

II. THERE IS NO CONFLICT BETWEEN THE CIRCUITS

As set forth above, the circuits are unanimous in holding that participation in an in-house sexual harassment investigation, not undertaken while any EEOC charge is pending, is not a "protected activity" under Title VII. *Abbott*, 348 F.3d at 543; *Total System Services, Inc.*, 221 F.3d at 1174; *Brower*, 178 F.3d at 1005-06; *Vasconcelos*, 907 F.2d at 113.

Since the case law prevents her from proceeding under Title VII's "participation clause," Ms. Crawford argues her interview with the Human Resources investigators on July 22, 2002 was really "opposition" conduct. "Opposition" conduct includes making informal protests of discriminatory employment practices, including making complaints to management, writing critical letters to customers, protesting against discrimination by industry or society in general, and expressing support for co-workers who have filed formal charges. *Curay-Cramer v. Ursuline Academy of Wilmington, Delaware, Inc.*, 450 F.3d 130, 135 (3rd Cir. 2006).

Under the "opposition clause," by "opposing" or "protesting" an alleged discriminatory employment practice, and by claiming retaliation resulted from such opposition, Ms. Crawford may invoke the protections of Title VII. *Booker v. Brown and Williamson Tobacco Co., Inc.*, 879 F.2d 1304, 1313 (6th Cir. 1989). However, "opposition" activity, by definition, consists of taking the initiative to report what the complainant perceives as conduct violating Title VII. An aggrieved party has to consciously take the initiative to **do** something which can reasonably be interpreted as "opposing" an unlawful employment practice.

To "oppose" something is "to place over against something so as to provide resistance, counterbalance or contrast; to place opposite or against something; to offer resistance to." Merriam-Webster Online Dictionary (2006-07 Ed.). The common thread in these definitions is the person doing the "opposing" has to actually do something to indicate "resistance."

The appellate decisions bear this out. In *Valentin-Almeyda v. Municipality of Aguadilla*, 447 F.3d 85, 96-97 (1st Cir. 2006), plaintiff was found to have engaged in protected "opposition activity" by affirmatively complaining about sexual harassment to her direct superior and to the designated equal opportunity officer for a municipal police department. In *Moore v. City of Philadelphia,* 461 F.3d 331, 343 (3rd Cir. 2006), plaintiffs were found to have engaged in "opposition" conduct by making numerous complaints about racially derogatory remarks to the offending supervisor and officers up the chain of command. In *Worth v. Tyer*, 276 F.3d 249, 265 (7th Cir. 2001), the court found when plaintiff reported to the local police that defendant had touched her breast, she was engaging in protected "opposition" activity. Similarly, in *EEOC v. Dinuba Medical Clinic,* 222 F.3d 580, 586 (9th Cir. 2000), the court found that a sexual harassment victim's filing of a criminal complaint for assault and battery qualified as "opposition conduct" because the complainant reasonably believed she was subject to the battery because of her gender. In *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 969 (9th Cir. 2002) (*en banc*) the court found the complainant engaged in "opposition" activity when she reported to her company's EEO manager that she was raped by a potential client of the firm. Finally, in *Trent v. Valley Electric Assoc. Inc.*, 41 F.3d 524, 525 (9th Cir. 1994) the court found plaintiff had engaged in "opposition" conduct when she reported sexually offensive comments to her office manager, and 30 days later she reduced her complaint to writing.

All these cases have one thing in common: plaintiffs engaged in "opposition" conduct because they consciously took affirmative steps to report conduct they reasonably

thought was unlawful under Title VII. This type of conduct is in marked contrast to Ms. Crawford's single interview with investigators on July 22, 2002, which she has contended all along was the "protected activity" upon which her retaliation claim rests. Similar to the plaintiff in *Booker*, 879 F.2d at 1313, at her interview Ms. Crawford was not "opposing" an "unlawful employment practice." She was requested to come to Human Resources. She did not know the subject of the meeting in advance. App. 4-6.

In response to questioning, she told the investigators that a fellow employee (Gene Hughes) had behaved in a sexually inappropriate manner.[4] (See *Booker*, 879 F.2d at 1313, where the allegation was that an employee had a racial intolerance). When viewed objectively, in context, such statements made in a single interview in an investigation initiated by someone else are not protected by the opposition clause. It is the objective message conveyed – not the subjective intent of the person sending the message – which determines whether true "opposition" activity has taken place. *Curay-Cramer*, 145 F.3d at 137. In answering the investigators' questions, Ms. Crawford was not "opposing" an employment practice she considered unlawful.

On pages 16-19 of her Petition, Ms. Crawford contorts the holdings of a number of cases trying to shoehorn them to support her position. In citing to *Cardenas v. Massey*, 269 F.3d 251 (3rd Cir. 2001), Ms. Crawford makes certain

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[4] Gene Hughes was the Director of Employee Relations in the Human Resources Department of the school system. Ms. Crawford was the Payroll Supervisor in the Business and Facility Services Department of the school system. They had different supervisors and different chains of command.

assumptions based on the recitation of facts and she presumes an inference drawn therefrom is the "holding" of the case. Without going into detail regarding each of the three alleged protected activities, it is enough to say that from the descriptions provided in the opinion, whether or not they occurred pursuant to a proceeding under Title VII is unclear at best. *Id.* at 260. What is clear is that the defendant never raised the issue, and that nowhere in the opinion is there any discussion whether these three alleged protected activities occurred pursuant to a proceeding initiated under Title VII. The court merely assumed that they did. *Id.* at 263.

The case of *Evans v. City of Houston*, 246 F.3d 344 (5th Cir. 2001) is easily distinguishable. In *Evans*, the grievance hearing at which Ms. Evans testified concerned her co-employee's Title VII claims of racial discrimination. 246 F.3d at 352. From the recitation of the facts, it is unclear exactly when Ms. Evans' co-employee actually filed an EEOC charge, but the Court assumed the grievance hearing concerned Title VII claims. *Id.*

In citing to *Scott v. County of Ramsey*, 180 F.3d 913 (8th Cir. 1999), Ms. Crawford again makes certain assumptions based on the recitation of facts and she presumes an inference drawn therefrom is the "holding" of the case. Whether or not Mr. Scott's conduct constituted true "opposition" activity was never discussed. The county apparently assumed he engaged in a protected activity when he was ordered to participate in a sexual harassment investigation. *Id.* at 916. *Scott* involved a question as to the sufficiency of the evidence to support a jury verdict, and the propriety of a condonation jury instruction. 180 F.3d at 917-18. The court never discussed whether Mr.

Scott's participation in a sexual harassment investigation was a protected activity.[5]

On page 17 of her Petition Ms. Crawford cites to *Hoffman v. Rubin*, 193 F.3d 959, 963-64 (8th Cir. 1999), for the proposition that answering questions from internal affairs investigators concerning sexual harassment, and "responding to questions from the press," constitute protected activities. However, a close reading of *Hoffman* reveals the court never specifically held that Mr. Hoffman's statements to the investigators were protected activity. *Id.* at 963. On the other hand, the court had no trouble concluding that Mr. Hoffman's completely self-initiated appearance on the television show "60 Minutes" to discuss sexual harassment was indeed protected. *Id.* In this case, however, Ms. Crawford made no television appearances.

Paradoxically, Ms. Crawford cites to *Total System Services*, a case upon which the Sixth Circuit relied in ruling against her. Crawford App. 8a. This case stands for the proposition that if no formal charge of discrimination has been filed with the EEOC, an employee's participation in an in-house investigation is not a protected activity. 221 F.3d. at 1174, n.2. Ms. Crawford quotes from a subsequent opinion denying a petition for rehearing *en banc*, but the fact that only one judge (out of eleven) dissented from the denial of *en banc* review illustrates how uncontroversial

[5] In fact, the sexual harassment claim which sparked the internal investigation may have been filed pursuant to Title VII. The recitation of facts in the opinion is unclear on this point. 180 F.3d at 916. In any event, the issue was not raised by the defendant and was not discussed by the court.

the panel's holding is. *EEOC v. Total System Services, Inc.*, 240 F.3d 899, 904 (11th Cir. 2001).

Finally, Ms. Crawford cites to *McDonnell v. Cisneros*, 84 F.3d 256, 262 (7th Cir. 1996) as a case which "emphatically rejects" the Sixth Circuit's holding in this case. Once again, Ms. Crawford's argument falls victim to hyperbole. *McDonnell* was decided in 1996, ten years prior to the Sixth Circuit's decision in this case. It is difficult to argue that an antecedent case can "emphatically reject" the holding of a subsequent case. Petition, p. 19.

Ms. Crawford focuses on Judge Posner's use of the term "passive resistance" to describe conduct which fell under the "opposition" clause. However, the conduct of the supervisor at issue consisted of "failing to carry out his employer's desire that he prevent his subordinates from filing discrimination complaints." *Id.* at 262. With apologies to Judge Posner, there is nothing "passive" about this. This describes a conscious decision made by a supervisor to refuse to obey an order because he thought it unlawful under Title VII. Factually, there is no comparison to Ms. Crawford's situation.

Ms. Crawford seeks to expand the reach of the "opposition clause" to include conduct she characterizes as "passive opposition." This stands the concept on its head. No matter how one characterizes the term, true "opposition" conduct implies some type of affirmative action by the complainant. As the supervisor did in *McDonnell*, failing to carry out his employer's desire to prevent his subordinates from filing discrimination complaints reflects a conscious decision to embark on a course of action. Ms. Crawford never made a similar decision. She was summoned to a Human Resources interview in which she had

no idea the topic was going to be allegations of sexual harassment made by a co-worker.

Requiring a plaintiff ostensibly engaging in "opposition" conduct to actually, actively initiate a complaint mirrors the requirement that an employee take advantage of workplace procedures to actively report alleged discrimination, as set forth in *Faragher v. City of Boca Raton*, 524 U.S. 775, 806-07 (1998). In *Faragher*, this Court noted that the "primary objective" of Title VII is not to provide redress but to avoid harm in the first place. *Id.* at 806. To that end, Title VII encourages employers to establish a complaint procedure "designed to encourage victims of harassment to come forward . . . " to let their complaints be known. *Id.* The Court recognized that a perceived victim of discrimination has a duty "to use such means as are reasonable under the circumstances to avoid or minimize the damages" that result from violations of the statute. *Id.* (Internal citations omitted). The Court crafted the two-part affirmative defense now applicable in supervisory hostile environment cases based in part on the recognition of the employee's "corresponding obligation of reasonable care to avoid harm." *Id.* at 807.

Requiring the allegedly victimized employee to actually initiate a complaint in order to "oppose" an allegedly unlawful workplace practice conforms with the employee's "obligation of reasonable care to avoid harm" articulated in *Faragher*. In order to avail oneself of the opposition clause, an employee has to actually, actively "oppose" something.

In contrast, Ms. Crawford complained to no one, until she was summoned to an interview. She did not complain to her boss (Bob Bohnensteil) since she felt "at the time, I did not feel like [he] was very responsive to that nature."

App. 1-2. She also chose not to complain to Mr. Bohnensteil's boss (John Dietz) or the Assistant Superintendent for Human Resources, Graciella Escobedo (a woman). *Id.*

Ms. Crawford did not engage in "opposition conduct." She cannot avail herself of the opposition clause.

III. THE "FOREBODING SCENARIO" MS. CRAWFORD PREDICTS IS UNLIKELY TO OCCUR

The final section of Ms. Crawford's petition is another "extrastatutory policy argument." She draws from the opinion of Judge Barkett dissenting from the denial of rehearing in *Total System Services*, 240 F.3d at 899, *et seq.* Ms. Crawford argues that employers will be emboldened by the Sixth Circuit's ruling in this case. She contends employers will aggressively pursue retaliation of employees who participate in internal investigations, and then hide behind the shield of the *Faragher* "affirmative defense" of showing the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and that the employee failed to take advantage of any preventative or corrective opportunities provided. Crawford App. 8a-9a. However, the Sixth Circuit succinctly disposed of this argument. *Id.*

The response to this "foreboding scenario" (Crawford App. 9a) is that the availability of the *Faragher* affirmative defense is predicated on the reasonableness of the employer's efforts to prevent or correct harassment, and the unreasonableness of an employee's efforts to take advantage of such opportunities. Crawford App. 9a. As the court pointed out, a policy of firing witnesses who speak negatively during internal investigations would constitute bad faith, thus leaving the employer ineligible to assert

the *Faragher* affirmative defense. *Id.* at 9a-10a. This simple truth completely undercuts Ms. Crawford's argument.

Ms. Crawford further argues that as a result of the Sixth Circuit's decision, in the Sixth Circuit right now a "well defined window of opportunity" exists in which an employer "is free to retaliate against witnesses" in internal investigations – from the time a witness participates in such an investigation until the actual filing of an EEOC charge by that witness or someone else. Petition, p. 22-23. However, if employers were as bent on retaliation as they are in plaintiff's imaginary world, they have been able to "freely retaliate" for years under these circumstances not only in the Sixth Circuit (*Abbot v. Crown Motor Co., Inc.*, 348 F.3d 537, 543 (6th Cir. 2003)), but also in the Eighth (*Brower*, 178 F.3d at 1005-6), the Ninth (*Vasconcelos*, 907 F.2d at 113), and the Eleventh Circuits (*Total System Services*, 221 F.3d at 1174). Ms. Crawford's effort to ring the alarm bells on this issue falls flat, because the legal proposition which disposed of this case has been long accepted by every circuit that has squarely considered the issue.

Finally, Ms. Crawford complains that the EEOC might have to update the information on its website if the Sixth Circuit's decision is allowed to stand. Petition, p. 23. Ms. Crawford perversely argues that this Court should alter the state of the law because the state of the law calls into question certain information made publicly available by the EEOC.

The fact that the EEOC's website is visited ten million times a year is a wonderful thing. However, if the EEOC has posted content on its website which conceivably

conflicts with established law, perhaps the EEOC should consider changing the content of its website. Ms. Crawford's suggestion that the Sixth Circuit (and the Eighth, Ninth and Eleventh) have ruled in a manner conflicting with EEOC policy positions – and that the law should be changed to comport with content on the EEOC's website – is specious. She has it backwards. If anything, the EEOC should consider revising its website so it comports with the law.

CONCLUSION

For the foregoing reasons, Ms. Crawford's petition should be denied.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR TENNESSEE
FOR THE MIDDLE DISTRICT
NASHVILLE DIVISION

VICKY S. CRAWFORD, Plaintiff, VS. THE METROPOLITAN GOVERNMENT OF NASHVILLE and DAVIDSON COUNTY, TENNESSEE, DR. GENE HUGHES and DR. PEDRO GARCIA, Defendants.	CASE NO. 3:03-0996 JURY DEMAND

Deposition of:

VICKY S. CRAWFORD

July 1, 2004

* * *

[15] Q. All right. Well, you're a long-time employee of the school system. Right?

A. Yes.

Q. Your understanding was, the only place you could make a report of that conduct to would be to Gene Hughes?

A. To employee relations office, yes, sir.

Q. Why didn't you tell your boss?

A. At the time, I did not feel like my boss was very responsive to that nature.

Q. Who was your boss?

A. Mr. Bohnensteil, Bob Bohnensteil.

Q. Why didn't you tell his boss?

[16] A. I didn't think of it.

Q. Who would that have been?

A. Chris Henson.

Q. In May of 2002?

A. Mr. Dietz. I beg your pardon. John Dietz.

Q. John Dietz?

A. Yes, sir.

Q. Did it ever occur to you to tell the head of human resources?

A. No, sir.

Q. In May of 2002, that would have been Graciella Escobedo. Do you agree?

A. Yes, sir, May 2002.

Q. Did you ever tell your boss, Mr. Bohnensteil; his boss, Mr. Dietz; or the head of human resources any of the other incidences you have described between you and Mr. Hughes from August 2001 to May of 2002?

A. I told Mr. Bohnensteil about it in October of 2002.

Q. What did you tell him?

A. Mr. Bohnensteil had asked me to work with Mr. Hughes regarding the sick leave bank. I told him that I was not in a position to work with Mr. Hughes. He asked me why, and I told him that I had been instructed by Veronica Fraizer not to interact with Mr. Hughes and the [17] reason why I should not interact with Mr. Hughes. That's when I told Mr. Bohnensteil.

Q. What specifically were the reasons why you told Mr. Bohnensteil why Veronica Fraizer told you not to interact with Mr. Hughes?

A. He asked me why I wouldn't work with Mr. Hughes. That's the reason why I told him that I had been instructed not to, and he asked why and by who.

Q. All right. So when he asked you why had you been instructed not to deal with Mr. Hughes, what did you tell him?

A. That I had been advised by Metro human resources not to.

Q. Did you tell him the specific instances of which you spoke to us about 10 minutes ago?

A. Yes.

Q. In October of 2002?

A. Yes.

Q. But by that point, those allegations had already been investigated by Veronica Fraizer. Right?

A. Yes.

Q. So starting when Mr. Hughes became employed there in August of 2001 up through May of 2002, is it your

testimony that you never had a nonsexual conversation with Gene Hughes?

[18] A. Yes. we were able to converse.

Q. You had to deal with each other to talk about the sick leave bank. Right?

A. Right.

Q. What other work-related issues did you have to deal with Mr. Hughes about?

A. Nothing.

Q. So it was your – in terms of what you were required to do for your job, it was basically – in terms of what you were required to do for your job that brought you into contact with Gene Hughes, it was working on the sick bank?

A. Yes, sir.

Q. And in the course of this time frame from August 2001 to May 2002, you could have normal business conversations with Mr. Hughes?

A. Yes.

Q. So how did you come to talk to Veronica Fraizer?

A. They contacted me in the payroll department, Delaine.

Q. Delaine Linville?

A. Yes, sir. Called me in my – called and asked if I could come down there to their office.

Q. She works in the main metro human resources department. Right?

[19] A. Yes.

Q. And she contacted you in the summer of 2002?

A. Yes.

Q. What did she say?

A. She asked if I could come down there, and once I came down there, they told me that Dr. Hughes – Dr. Garcia had asked them to investigate some allegations in regards to Mr. Hughes. They asked me where my office was in relationship to Mr. Hughes' office, what type of work relationship that we had.

Q. Okay. Anything else?

A. And if there had been any inappropriate behavior by Mr. Hughes.

Q. Prior to the human resources investigators, Veronica Fraizer and Delaine Linville, prior to them contacting you and asking you to come to their office, you had never reported this conduct, which you're complaining about now, to anyone at the school system, had you?

A. That's correct.

Q. So do you recall the date you went to talk to Delaine Linville and Veronica Fraizer?

A. Not the actual date. It was in the month of July.

Q. Right. Have you ever seen their notes of your meeting?

[20] A. Yes. I've seen this before.

Q. Do you agree with me there's a date of July 22, 2002 up there?

A. Yes.

Q. Would you agree with me that that would be the date that you met with Veronica and Delaine?

A. Yes.

Q. I'm not going to ask you any more questions about that. I was trying to nail down the date.

So tell me what happened at this meeting. I mean, did you know what you were going to meet with them for before you went there?

A. No, sir.

Q. Did you know there was an investigation of Gene Hughes before you went there?

A. No, sir.

Q. Okay. So you went there not knowing what to expect, really?

A. That's correct.

Q. So tell me how they started the conversation.

A. They asked what my job was. They asked what – where my office was. They asked who I normally dealt with on a daily basis as far as the different departments and why I would have to work with that individual department. Then they asked me my – where my office was in [21] relationship to Mr. Hughes' office, what I had to do – how my office interacted with his office. And then they

asked if I had – if he had ever, as far as inappropriate behavior, conducted himself in an inappropriate way.

Q. All right. And then – you tell me if I'm putting words in your mouth, but then you told them the things that you told us about 15 minutes ago here in this deposition?

A. That's correct.

Q. The various instances of inappropriate conduct by Mr. Hughes?

A. That's correct.

* * *

App. 8

Fact Finding Report

Department: Board of Education
Fact finders: Veronica Frazier and Delaine Barwise
Date: September 13, 2002

Summary:

Jennifer Bozeman, an attorney with the Legal Department, contacted the Human Resources Department about a potential sexual harassment complaint in regard to Dr. Gene Hughes, Director of Employee Relations for the Metropolitan Nashville Public School System. As an attorney for the Board of Education, Ms. Bozeman felt an obligation to responsibly address these issues in order to ensure compliance with the established policies and procedures and to make sure that there were no unforeseen problems in the workplace.

As the Director of Employee Relations, Dr. Hughes is responsible for EEO investigations, including sexual harassment claims that are made by the Board of Education's employees. The scope and complexity of Dr. Hughes' position with the Metropolitan School District, in addition to obvious conflicts that may arise due to such serious allegations, clearly put Ms. Bozeman on notice to address these concerns with Dr. Pedro Garcia, Superintendent of Public Schools, and the Human Resources Department.

Witnesses:

Unless required for a direct quote, responses from interviews are summarized. Those interviewed are listed below in alphabetical order. All witnesses are employees with the Board of Education.

Jennifer Bozeman	Jackie Gauthier	Diane Proffitt
Diane Burden	Dr. Gene Hughes	Tamara Sadler
Vickie Crawford	Jayme Merritt	Dr. Julie Williams

Allegations

During routine conversation, Ms. Bozeman learned from Ms. Tamara Sadler, an Administrative Assistant with the Board of Education that there were several employees within the Administrative offices that had expressed concern about specific incidents of inappropriate behavior exhibited by Dr. Hughes.

Throughout the course of the investigation, Fact finders learned about other general allegations concerning the workplace environment at the Board of Education. Although these matters were brought to our attention, they are not in the realm of this EEO claim. However, due to the severity and seriousness of these claims, the Internal Audit Division of the Finance Department has been notified in order to ensure that these matters are investigated and resolved.

In the following report, Fact finders have attempted to address all allegations made by the complainants that would be covered under EEO guidelines.

A. Inappropriate Physical Contact

1. In May 2002, a witness alleged that she approached Dr. Hughes concerning business that he was conducting with the Payroll Department, and said, "Hi, Dr. Hughes. What's up?" The witness claims that Dr. Hughes entered her office and pulled the witnesses' head into his crotch. The witness stated that her head touched Dr. Hughes' pants and

groin area. The witness allegedly responded to Dr. Hughes by saying, "Get the hell out of my office."

Response

Dr. Hughes does not recall any specific incident where he would have pulled someone's head into his crotch. Dr. Hughes acknowledged that he frequently has questions about payroll issues in connection with sick pay, workers' compensation pay and leaves of absence. Dr. Hughes agreed that it would not be out of the ordinary for him to request information from the payroll department.

B. Inappropriate Behavior

1. Fact finders asked a witness to describe Dr. Hughes' demeanor. The witness responded, "Dr. Hughes struts around like a rooster in a hen yard. He pulls his shoulders back and acts like a bad ass, a super-duper football player." The witness alleges that when she would say, "Hi, Dr. Hughes. What's up," Dr. Hughes would grab his crotch and say, "I'll tell you what's up."

2. A witness alleged that Dr. Hughes walked up to the window facing into her office and said, "Hey Baby, come on, don't you want to get close to my body?" The witness stated that Dr. Hughes proceeded to rub his body against the window.

3. A witness alleged that while she was sitting at her desk in her office, Dr. Hughes came in and said, "Why don't you show me some titties?" The witness replied, "I'd better not,

Pedro would not like that." Dr. Hughes said, "You never know, he might."

4. In addition to these allegations, the witness told Fact finders that it was not unusual for her and Dr. Hughes to engage in conversation that included sexual references. The witness said that her normal response to these verbal exchanges would include, "Go to hell," or "Kiss my ass," and she would often motion to him by "flipping him a bird." The witness described their working relationship as "casual."

5. A witness stated that at first, Dr. Hughes made her feel uncomfortable. When questioned further about this statement, the witness said, "Just how he interacts." On one occasion, the witness alleged that Dr. Hughes questioned her and said, "What the fuck do you think you're doing?" The witness claimed that the most inappropriate behavior that Dr. Hughes displayed in the office was the hand gesturing and motioning in front of his crotch. The witness also stated that Dr. Hughes often used the phrase, "Bite me."

   This witness expressed a serious concern about retaliation from her participation in the investigation. The witness claimed, "If my name comes out of this, I won't have a part-time job."

   ***Fact finders note that this witness was terminated mid-investigation, shortly after the interview on June 24, 2002. Dr. Julie Williams, Assistant Superintendent of Human Resources, stated that**

she was responsible for the termination of this witness. Dr. Williams further indicated that Dr. Hughes had nothing to do with the decision to terminate this witness' part-time employment. Dr. Williams stated that she was not aware of the investigation, the claims that this witness made during the interview session, or this witness' apprehension in coming forward to discuss her work relationship with Dr. Hughes. Dr. Williams commented that no one at the Board of Education really knew that this witness was on the payroll. Dr. Garcia was not aware of her employment or her position. Dr. Williams said that after inquiring about her work and her responsibilities she learned that the witness was under Dr. Hughes' supervision. One of this witness' responsibilities during the year was the coordination of the Annual Teacher's Banquet. Dr. Williams stated that the witness was a retired principal and had continued to receive her pension in addition to receiving the same annual salary that she received as a principal. During the time that the witness was on the Board of Education's administrative payroll, she received an annual salary of $58,000 plus her retirement pension. At the end of the fiscal year, Dr. Williams determined that this witness' services were no longer needed, as her employment with the Board of Education was not under contract. Dr. Williams acknowledged that this witness' pay was at the top of the pay scale

for principals and the witness was not contributing to a student-based budget. Dr. Williams said, "For $58,000, we could hire two clerks for Dr. Hughes. Gene Hughes did not have anything to do with the termination – It was my decision and it was strictly budgetary."

6. A witness referenced her perception of Dr. Hughes' interaction with the Union and Mr. McMackin. The witness alleged that Dr. Hughes continuously made snide comments about the Union. In a discussion with Dr. Hughes, the witness claimed that Dr. Hughes said, "You would do better if you quit hanging with the enemy. I can see to it that you are never in administration. That's not a threat, that's a promise."

***Fact finders note that Dr. Williams said that she counseled Dr. Hughes on his performance and behavior when dealing with the Union. Dr. Williams said that she advised Dr. Hughes to change his demeanor when communicating with the Union officials. Dr. Williams said that the Union officials did not consider Dr. Hughes to be attentive and was often perceived to be aggressive and terse in his interaction with the Union.**

Response

Dr. Hughes denies all allegations of inappropriate conduct or conversations that would entail sexual references. In addition, Dr. Hughes rejects any claims that he touched himself or made comments or suggestions

about masturbation. Dr. Hughes disagrees with the allegation that that he used the word "fuck" and does not believe that he ever made an employee feel uneasy or uncomfortable.

Dr. Hughes concedes that he uses the phrase "bite me" at work and has possibly said, "Go to hell," in addition to engaging in hand gesturing when "shooting a bird."

Dr. Hughes admits to participating in inappropriate language with one particular witness. Dr. Hughes agreed with the term "banter" when describing these conversations; however Dr. Hughes refutes the claim that this communication contained sexual terminology or innuendo.

Dr. Hughes acknowledged that he sensed a great deal of animosity toward him upon his acceptance of his current position with the Board of Education. Dr. Hughes believed that the person that was in his position prior to his employment was responsible for the ill will and hostility that he has endured from the beginning of his service with Metro Schools. Dr. Hughes emphasized to Fact finders that upon the completion of this investigation, he assumed that more complaints would follow.

Issues and Conclusions

A. Inappropriate physical contact

Fact finders could not confirm allegations of inappropriate physical contact between one witness and Dr. Hughes at their workplace. Dr.

Hughes denies such behavior and there are no witnesses to corroborate the witness' claim.

B. Inappropriate behavior

1. Fact finders could not confirm the complainants statements; however, Fact finders note that more than one witness referenced their perception of Dr. Hughes' arrogance and penchant for grabbing his crotch.

2. Fact finders could not confirm the complainants allegations. Dr. Hughes denies such behavior and them are no witnesses to corroborate the witness' claim.

3. Fact finders could not confirm the witness' allegations. Dr. Hughes denies such behavior and there are no witnesses to corroborate the witness' claim.

4. Fact finders did find evidence of inappropriate behavior between this witness and Dr. Hughes; however, Fact finders could not confirm the witness' allegations where conversation included sexual references, since Dr. Hughes denied any use of sexual references or innuendo. Both parties admitted to Fact finders that their conversation and work relationship was routinely casual in nature. Dr. Hughes and this witness acknowledged use of inappropriate language during conversations at work. Dr. Hughes and this witness concede to using hand motions when "shooting a bird," in response to a comment.

5. Fact finders could not confirm the complainant's allegation that Dr. Hughes used the word "fuck." Dr. Hughes did admit during

Fact finders first interview that he used the phrase "bite me," but could not think of a time when the phrase might be appropriate or what context he would have used the phrase at work. At the completion of Fact finders second interview, Dr. Hughes admitted to using the phrase "bite me" at work.

6. Fact finders could not confirm complainant's statements. Dr. Hughes denies that he made such a reference to the witness' relationship with the Union. Dr. Hughes recognized that he does have a difficult relationship with the Union and that their communication is often strained and tense.

Fact Finders' Observations

- Fact finders agree that Ms. Bozeman was put on notice to report issues and concerns about an employee at the Board of Education, regarding behavior that might constitute Sexual Harassment as conveyed to her by another employee at the Board of Education. The complexity of Dr. Hughes' position, including his responsibility in reviewing and investigating sexual harassment complaints clearly compounded Ms. Bozeman's concerns.

- Fact finders concluded that Dr. Hughes did participate in inappropriate and unprofessional behavior. After completing the interviews, Fact finders noted that there were some employees who engaged in inappropriate language and behavior before Dr. Hughes was employed. It appears that management at the Board of Education has never addressed this inappropriate language and behavior in their workplace.

- The perception of management at the Board of Education, in addition to gossip and rumor-mongering,

has most certainly lead to a workplace that is plagued by low employee morale and raises concern about productivity. Management personnel at the Board of Education may want to renew their efforts to establish and maintain a productive workplace that is respectful of all employees. A work environment that is conducive to ethical standards and professionalism will in turn foster a high level of production, efficiency, and creativity and will improve workplace morale.

- Fact finders did note that two of the witnesses were especially fearful about the loss of their jobs. The witnesses' apprehension about participating in this investigation was greater than Fact finders would reasonably expect.

- Fact finders were made aware of allegations concerning drug purchasing and drug use between a witness and an employee in the mailroom.

- Fact finders recommend that the Board of Education complete an assessment of the Human Resource Division and provide training and education for staff with an emphasis on supervisory training. Metro Human Resources would be happy to assist the Board of Education with any training needs. Please call Flora Fann at 862-6640 for further training information.

BILL PURCELL
MAYOR

[LOGO]

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY

September 13, 2002

Ms. Kim McDoniel
Internal Audit Manager
Finance Department
222 3rd Avenue North
Nashville, TN 37201

HUMAN RESOURCES
CIVIL SERVICE COMMISSION
EMPLOYEE BENEFIT BOARD
SUITE 200, 222 BUILDING
3RD AVENUE NORTH
NASHVILLE, TENNESSEE 37201

Dear Ms. McDoniel,

Upon the recent completion of an investigation at the Board of Education, our staff determined there to be several concerns in the Payroll Department. Due to the seriousness of these claims, the Human Resources Department finds it necessary to refer these issues to the Internal Audit Division to ensure that these claims can be appropriately addressed.

The following points highlight our concerns and issues in the Payroll Department:

- Negligence in sending payments to the appropriate creditors for collected Student Loan garnishments, which resulted in possible non-payment of the 2001 Tax Credit
- Child Support payments that were not credited to the appropriate agencies, which resulted in possible non-payment of the 2001 Tax Credit

- No audit trail for employee's Sick Bank
- Scheduled worktime not represented by actual time worked

We appreciate your attention to these matters. In order to assist in your review of this matter, we can provide names of witnesses who may be of help. If I can be of further assistance, please do not hesitate to contact me.

Sincerely,

/s/ Veronica T. Frazier
Veronica T. Frazier
Assistant Director of Human Resources

cc: David Manning
Ms. Jennifer Bozeman
Mr. John W. (Billy) Lynch

[LOGO] METROPOLITAN NASHVILLE PUBLIC SCHOOLS

Chris M. Henson
Assistant Superintendent
Business and Facility Services

2601 Bransford Ave. • Nashville, TN 37204 •
615/259-8515 • Fax: 615/259-8750

December 4, 2002

Ms. Vicky S. Crawford
723 Tobylynn Drive
Nashville, Tennessee 37211

RE: Disciplinary Action

Dear Ms. Crawford:

On November 7, 2002, you were placed on administrative leave so that an investigation could be conducted into potential problems within your office. Since that time, numerous operational irregularities have been discovered and brought to my attention. These matters raise serious concern about your performance in handling the duties and responsibilities of your position as Payroll Coordinator.

The investigation reveals the following:

1. Failure to resolve payments returned by vendors – uncashed checks found within your office include:

    a. Metropolitan Life Insurance Company – $54,203.34 – Dated Jan. 31, 2002
    b. State of Tennessee – $149.95 – Dated Jan. 11, 2002
    c. State of Tennessee – $78.75 – Dated Aug. 14, 2001
    d. Security Benefit Life Ins. Co. – $200.00 – Dated July 2, 2002

e. Educators Credit Union – $50.00 – Dated Nov. 27, 2001
f. Educators Credit Union – $50.00 – Dated Sept. 14, 2001

2. Failure to deposit checks received for pension contributions and overpayments – undeposited checks found within your office include:

a. Marie P. Ross – $585.95 – Dated June 29, 2001
b. Robert O. Lane – $132.47 – Dated Aug. 19, 2002
c. Henry J. Murrell – $1,694.86 – Dated Sept 7, 2001

3. Failure to properly remit and/or resolve employee annuity contributions – the following matters were found in your office:

a. Returned uncashed check made payable to Prudential Securities Inc. involving annuity accounts of 11 employees – $4,088.50 – Dated May 24, 2002
b. Returned uncashed check made payable to Investors Diversified Services involving annuity account of four employees – $557.50 – Dated July 5, 2002

4. Failure to properly remit court ordered payments to Davidson County General Sessions Court or return to employee – matters found in your office include the following:

a. Returned uncashed check originally remitted for payments on garnishments – returned due to failure to notify Court of defendants for which check was

submitted – $7,957.28 – Dated May 10, 2002

b. Returned uncashed check originally remitted for payment on a garnishment – returned due to satisfaction of account and should have been submitted to employee – $165.70 – Dated May 24, 2002

5. Failure to properly handle various issued/reissued checks – matters found in your office include the following:

a. Check to Juvenile Court of Davidson County – $2,633.44 – Dated March 28, 2002
b. Check to Provident Life for insurance premium – $5,203.60 – Dated March 28, 2002
c. Check to Ohio National Life Ins. Co. – $3,255.00 – Dated June 10, 2002
d. Check to Prudential Insurance Co. of America – $20.00 – Dated May 20, 2002
e. Check to UNUM Life Ins. Co. – $1976.20 – Dated July 18, 2002
f. Check to Monumental Life Insurance Co. – $24.88 – Dated. April 12, 2002
g. Payroll check to Tovar Israel – $156.17 – Dated Oct. 11, 2002
h. Payroll check to Amy L. Bogle – $487.71 – Dated Aug. 2, 2002
i. Garnishment refund check to James Green – $89.55 – Dated Aug. 22, 2002
j. Payroll replacement check to Joel Grimes – $397.55 – Dated June 14, 2002
k. Payroll checks to Donna Elaine Rice – $7997.99 – Dated Oct 12, 2001 – May 24, 2002

1. Payroll check to Edith A. Noland – $1,090.45 – Dated Dec. 18, 2001

6. Failure to properly handle voided checks

7. Failure to file Federal Tax returns timely and accurately potentially resulting in significant penalties

Based upon the above information, you are alleged to have violated the following rules found in Chapter VIII of the Handbook for Support Personnel:

1. Neglect of duty.
2. Failure to perform your duties.
3. Inefficiency in the performance of your duties.

As a result, I am contemplating taking disciplinary action against you. According to the Handbook for Support Personnel, the types of disciplinary action that can be considered include warning, reprimand, suspension, demotion, dismissal or other appropriate action.

In order to address the charges set out in this letter, and before any decision is made on disciplinary action, an administrative departmental hearing, conducted by me, is scheduled for Wednesday, December 11, 2002, at 10:30 a.m. in my office conference room (C-321). You have the right to have a representative with you at this hearing. The purpose of this hearing is to give you and/or your representative the opportunity to respond to the charges against you. The meeting is informal. You may present statements, witnesses, or any other information in regard to the charges.

If you desire, the hearing may be waived by signing the attached waiver of hearing statement. By waiving the

hearing, any decision on disciplinary action will be based upon the information that has been provided to me concerning these charges. If applicable, the waiver form should be submitted to me prior to the hearing date.

Sincerely,

/s/ Chris M. Henson
Chris M. Henson

CMH:bh

Attachment Waiver of Disciplinary Hearing

cc: Dr. Pedro Garcia
Dr. Julie Williams
Mr. Bob Bohnenstiel
Mr. Mike Safley

Waiver of Disciplinary Hearing

I, Vicky S. Crawford, as indicated by my signature below, hereby waive the disciplinary hearing that has been scheduled for me before Chris Henson concerning the charges in the attached letter. I understand that by waiving this hearing, any decision on disciplinary action will be based upon the information that has been provided to Mr. Henson concerning these charges.

Vicky Crawford

Date

[LOGO] METROPOLITAN NASHVILLE PUBLIC SCHOOLS

Chris M. Henson
Assistant Superintendent
Business and Facility Services

2601 Bransford Ave. • Nashville, TN 37204 •
615/259-8515 • Fax: 615/259-8750

January 6, 2003

Ms. Vicky S. Crawford
723 Tobylynn Drive
Nashville, Tennessee 37211

RE: Disciplinary Action

Dear Ms. Crawford:

Pursuant to my letter dated December 4, 2002, you were notified of the results of an investigation that had been conducted into potential problems within the Payroll office. The investigation revealed numerous operational irregularities. These irregularities were specifically identified in that correspondence.

As a result of the reported irregularities, my letter charged you with violation of the following rules found in Chapter VIII of the Handbook for Support Personnel:

1. Neglect of duty.
2. Failure to perform your duties.
3. Inefficiency in the performance of your duties.

I notified you that as a result of these charges, I was contemplating disciplinary action against you. Before taking such action, however, a disciplinary hearing was scheduled to give you and/or your representative the opportunity to respond to these charges. This hearing was conducted on December 12, 2002.

At the hearing, you were represented by Ann Steiner, Attorney-at-Law. Little defense or explanation was provided in response to the enumerated irregularities. Some testimony was presented that related to the charge concerning the handling of voided checks.

Based upon the results of the investigation, and after giving you an opportunity to respond to the charges, I have reached the conclusion that the irregularities, as set out in my December 4th letter, are true and are a direct result of your failure to properly perform your duties and responsibilities as Payroll Coordinator. Thus, I find you guilty of the above listed charges. Although this finding of guilt includes the allegation concerning the improper handling of voided checks, due to the explanation your witnesses provided at the hearing, I am disregarding this issue in determining the appropriate disciplinary action.

I realize that you have provided many years of service to the Metropolitan Nashville Public School System. Unfortunately, due to the serious nature of the violations that you have committed, I find that it is necessary to terminate your employment effective today, January 6, 2003.

As allowed by the rules in Chapter VIII of the Handbook for Support Personnel, you have the right to appeal my decision to the Director of Schools. According to the Handbook, a "request for an appeal hearing must be delivered to the Director of School's office within (5) working days. . ." of this notification. If you request such an appeal, you will be entitled to a representative of your own choosing.

Sincerely,

/s/ Chris M. Henson
Chris M. Henson

CMH:bh

Attachment Waiver of Disciplinary Hearing

cc: Dr. Pedro Garcia
Dr. Julie Williams
Mr. Bob Bohnenstiel
Mr. Mike Safley

IN RE:)
)
VICKY S. CRAWFORD)

DECISION OF THE DIRECTOR OF SCHOOLS

Dr. Pedro Garcia
Director of Schools
Metropolitan Davidson County
Public Schools
2601 Bransford Avenue
Nashville, TN 37204
(615) 259-8419

IN RE:)
)
VICKY S. CRAWFORD)

DECISION OF THE DIRECTOR OF SCHOOLS

FINDINGS OF FACT

This matter came to be heard on Thursday, February 6, 2003 before Dr. Pedro Garcia, Director of Schools, the Metropolitan Davidson County Public Schools. This matter is an appeal of the dismissal of a classified employee, Vicky S. Crawford.

Ms. Crawford was employed by the Metropolitan Public Schools on September 14, 1972. From 1977 until her placement on administrative leave in 2002, Ms. Crawford served in the payroll department, last serving in the position of payroll coordinator.

On December 4, 2002 Chris M. Henson, Assistant Superintendent gave Ms. Crawford a letter for Business

and Facility Services [sic]. The detailed seven allegations as follows:

1. failure to resolve payments returned by vendors;
2. failure to deposit checks received for pension contributions and overpayments;
3. failure to properly remit and/or resolve employee annuity contributions;
4. failure to properly remit court ordered payments to Davidson County General Sessions Court or return to employees;
5. failure to properly handle various issued/reissued checks;
6. failure to properly handle voided checks;
7. and failure to file federal tax returns timely and accurately potentially resulting in significant penalties.

According to Mr. Henson, these allegations support the charges of neglective [sic] duty, failure to perform duties, and inefficiency in the performance of duties.

Subsequent to the completion of the investigation in this matter, Mr. Henson issued a second letter to Ms. Crawford dated January 6, 2003 in which he opined that there was adequate evidence to support the charges of neglective [sic] duty, failure to perform duties, and inefficiency in the performance of duties. Mr. Henson further found that there was little defense or explanation provided to the enumerated irregularities discovered in Ms. Crawford's office. Upon review of all the facts and evidence, it was Mr. Henson's determination that Ms. Crawford should be terminated from her employment effective January 6, 2003. A copy of that letter is attached as Exhibit 2 to the

transcript of the proceedings in this matter. If is from the recommendation for termination that the appeal to this office is taken.

During the course of the hearing, sworn testimony was obtained from witnesses called by both the school system and the employee. The first such witness was Joseph C. Sullivan, a forensic auditor with KPMG. KPMG is the audit firm employed by the Metropolitan School System to perform its annual audits. As a forensic auditor, Mr. Sullivan performs investigative functions for the onsite auditors. Mr. Sullivan was summoned to the KPMG office in Nashville when an auditor stated that there were some concerns regarding potential irregularities and inefficiencies in the payroll department which were discovered during the routine audit process. A partner in the KPMG Nashville office contacted the Atlanta Forensic Audit Unit and asked that they examine what was identified as potential problems with the audit. Mr. Sullivan's unrebutted testimony is that he met with the auditors who were already onsite, spoke with them, and listened to their concerns. He then focused on a number of areas specifically relating to the operations of the payroll department.

During the course of his activities, Mr. Sullivan entered the office of Ms. Crawford in a search for documents. He found the office extremely unorganized. In his words, " . . . there were literally papers everywhere, on the floor, strewed [sic] about the desk, thrown in the bookcases in the office itself and there seemed to be no rhyme or reason. As I say, papers were just piled all over literally in a very unorganized fashion." Mr. Sullivan reviewed these documents and identified several as being problematic, *to wit*:

1. A check in the amount of fifty-four thousand two hundred and three dollars and thirty four cents ($54,203.34) made out to the Metropolitan Board of Education to the attention of Vicky Crawford that was received in the payroll office but never cashed. The date on the check was January 31, 2002. On April 19, 2002 and again on July 19, 2002 MetLife issued letters to Ms. Crawford stating that the check to the Metropolitan School System remained uncashed and an explanation was requested.

2. A check in the amount of one hundred and forty-nine dollars and ninety-five cents ($149.95) dated January 11, 2002 made payable to the Metropolitan Public Schools.

3. A check in the amount of seventy-eight dollars and seventy-five cents ($78.75) dated August 14, 2001 from the state of Tennessee payable to the Metropolitan Board of Education.

4. A check in the amount of two hundred dollars ($200.00) dated July 2, 2002 from the Security Benefit Life Insurance Company payable to the Metropolitan Public Schools.

5. A check in the amount of fifty dollars ($50.00) dated September 14, 2001 made payable to the Metropolitan Board of Education from the Educators Credit Union.

6. A check in the amount of five hundred and eighty-five dollars and ninety five cents ($85.95) [sic] dated July 29, 2001 made payable to the Metropolitan Board of Education by a Marie R. Heath for the estate of Marie P. Ross.

7. A check in the amount of one hundred and thirty-two dollars and forty-seven cents ($132.47) dated August 19, 2002 made payable to the Metropolitan Board of Education from Robert O. Lane.

8. A check in the, amount of one thousand six hundred and ninety-four dollars and eighty-six cents ($1,694.86) dated September 7, 2001 made payable to the Metropolitan Board of Education from the estate of Jamie Steel Mitchell.

9. A check in the amount of four thousand and eighty-eight dollars and fifty cents ($4,088.50) dated May 24, 2002 sent back to the Metropolitan Board of Education from Prudential Financial.

10. A check in the amount of five hundred and fifty-seven dollars and fifty cents ($557.50) dated July 5, 2002 returned to the Metropolitan Board of Education from Investors Diversified Services.

11. A check in the amount of seven thousand nine hundred and fifty-seven dollars and twenty-eight cents ($7,957.28) dated May 10, 2002 payable to the Davidson County General Session Court for payments on garnishments.

12. A check in the amount of one hundred and sixty-five dollars and seventy cents ($165.70) dated May 24, 2002 returned to the Metropolitan Board of Education on behalf of Todd Lawson.

13. A check in the amount of two thousand six hundred and thirty-three dollars and forty-four cents ($2,633.44) dated March 28, 2002 payable to the Juvenile Court of Davidson County.

14. A check in the amount of five thousand two hundred and three dollars and sixty cents ($5203.60) dated March 28, 2002 payable to the Provident Life Insurance Company.

15. A check in the amount of three thousand two hundred and fifty-five dollars ($3,255.00) dated June 10, 2002 made payable to the Ohio National Life Insurance Company.

16. A check in the amount of twenty dollars ($20.00) dated May 20, 2002 made payable to the Prudential Insurance Company of America.

17. A check in the amount of one thousand nine hundred and seventy-six dollars and twenty cents ($1,976.20) dated July 18, 2002 made payable to the UNUM Life Insurance Company.

18. A check in the amount of twenty-four dollars and eighty-eight cents ($24.88) dated April 12, 2002 made payable to the Monumental Life Insurance Company.

19. A payroll check in the amount of four hundred and fifty-six dollars and seventeen cents ($456.17) dated October 11, 2002 payable to Tovar Israel.

20. A payroll check in the amount of four hundred and eighty-seven dollars and seventy-one cents ($487.71) dated August 2, 2002 payable to Amy L. Bogle.

21. A check in the amount of eighty-nine dollars and fifty-five cents ($89.55) dated August 22, 2002 which is a garnishment refund check to James Green.

22. A check in the amount of three hundred and ninety-seven dollars and fifty-five cents ($397.55) dated June 14, 2002 that appears to be a payroll replacement check to Joel Grimes.

23. Several payroll checks totaling seven thousand nine hundred and ninety-seven dollars and ninety-nine cents ($7,997.99) dated from October 12, 2001 through May 24, 2002 constituting payroll checks to Donna Elaine Rice.

24. A check in the amount of one thousand and ninety dollars and forty-five cents ($1,090.45) dated December 18, 2001 appearing to be a payroll check to Edith A. Noland.

In addition to the above-items found in Ms. Crawford's office, Mr. Sullivan also testified finding correspondence from the Internal Revenue Service addressed directly to Ms. Crawford detailing inaccuracies in the filings to the Internal Revenue Service. According to Mr. Sullivan, the document details a total penalty due from the Metropolitan Board of Education that exceeds one million dollars ($1,000,000.00). These documents can be found in collective Exhibit 3 to the transcript of this proceeding.

The next witness called by the School District was Diane Burden, currently an employee in Human Resources but formerly an employee in the Payroll Department working under the supervision of Ms. Crawford. During the course of her testimony, Ms. Burden detailed

instances in which she was requested by the Director of Business Services to enter Ms. Crawford's office and retrieve vendor checks that had not been mailed and about which questions had been raised. Additionally, Ms. Burden testified that three employees, herself Tangiey Broughton, and Taronda Sanders, visited with Bob Bohnenstiel regarding complaints in the operation of the payroll office. Those complaints included employees calling saying that Ms. Crawford would not return their telephone calls as well as complaints from vendors stating that checks had not been received. Additionally, Ms. Burden testified to problems in the payroll office with student loan payments and child support checks not being remitted to proper vendors.

As a result of complaints to Mr. Bohnenstiel, a directive was issued that all checks would be copied with the copies being supplied to Mr. Bohnenstiel thereby assuring that the originals were mailed to proper vendors. Ms. Burden testified that since Ms. Crawford's removal from the payroll office, the copying of checks had ceased due to the fact that checks were being timely submitted to the vendors.

The next witness, Bob Bohnenstiel, Director of Business Services for the Metropolitan School System, testified that he was aware of concerns and/or problems that had been expressed by departmental employees regarding Ms. Crawford. Mr. Bohnenstiel testified that those problems included timeliness in sending out checks, including vendor checks for annuities or garnishments, and timeliness in refunding money to employees where money had been paid to an annuity but the membership in the annuity had been cancelled. Mr. Bohnenstiel said he discussed these problems with Ms. Crawford and that is [sic] was his

general impression that Ms. Crawford understood the problem. Mr. Bohnenstiel testified that they tried several methods to overcome their apparent inability to get checks to the appropriate vendor including, in some cases, his assuming the duties for mailing checks and for keeping a spreadsheet of each check mailed. Mr. Bohnenstiel also assigned other employees in the office the duty to mail the checks and he subsequently followed up with the school audit staff to make sure that the checks had cleared.

As to the problems with the Internal Revenue Service filings, Mr. Bohnenstiel testified that on several occasion [sic] the IRS notified the Metropolitan School System that the forms had not been received. He would instruct Ms. Crawford to complete an additional form for submission. Mr. Bohnenstiel further testified that copies of forms Ms. Crawford claimed had been filed were not often readily available. In fact, Mr. Bohnenstiel testified that it may be hours or days before a duplicate form was recreated and mailed.

The next witness, Chris Henson, Assistant Superintendent for Business and Facility Services for the Metropolitan Schools testified that phone calls to his office began a few days after be began work on July 1, 2002. Those complaints included calls from the IRS regarding the late filed form 941, employees calling regarding their annuity payments that had not been remitted to the appropriate vendor, and meetings with the three payroll clerks regarding problems with their immediate supervisor, Ms. Crawford. Mr. Henson testified that the employees wanted to make complaints regarding the way the payroll office had been run and was being operated and complaints regarding the length of time that it took to resolve the employee complaints. Mr. Henson testified that it was

he who preferred charges against Ms. Crawford after reviewing allegations pertaining to the operation of the payroll office, her supervision of the payroll department and the evidence located in her office during the audit investigation. Further, Mr. Henson testified that the information upon which he based the recommendation for termination came as a result of the findings in the KPMG audit that included conversations with the KPMG Forensics Unit, the KPMG Audit Team, Metro Internal Audit, and the Metro Legal Department. Mr. Henson further testified that he discussed the problems in a preliminary fashion with Mr. Bohnenstiel and was informed that methods and procedures were being implemented to reduce the number of complaints and inquiries from Employees as well as vendors. However, this was prior to the final audit report and the forensics investigation both conducted by KPMG.

Mr. Henson stated that Ms. Crawford was placed on administrative leave with pay pending the completion of the investigation and that on January 6, 2003, Ms. Crawford was notified of her termination. A departmental hearing was conducted on December 12, 2002 regarding the complaints in the audit findings. At the time of the departmental hearing, Ms. Crawford was still receiving her full pay. Mr. Henson testified that she was given the opportunity to explain anything she wanted in reference to the charges for her termination. Mr. Henson testified that Ms. Crawford did not directly address or respond to any matter in her departmental hearing.

Next to testify in this matter was Vicky S. Crawford, the employee about whom this hearing was initiated. Ms. Crawford testified that she began her employment with the Metro School System on September 14, 1972 and that

she moved to the payroll department in 1977 where, until her termination, she remained an employee. Ms. Crawford testified that prior to the summer of 2002 no one ever questioned her job performance with the Metropolitan School System. Ms. Crawford testified further that she has never been reprimanded in the course of her employment. Ms. Crawford began her testimony with accusations of sexual harassment against Dr. Gene Hughes, another employee of the Metro School System. It is evident from the opening argument of counsel in this matter that Ms. Crawford somehow links Dr. Gene Hughes to the employment action about which the hearing was requested. However, during the course of her testimony in both direct and cross-examination, Ms. Crawford failed to provide any definitive evidentiary link to Dr. Gene Hughes and this termination action other than the allegation of sexual harassment which is being litigated in another forum.

When asked specifically about some of the evidence found in her office, Ms. Crawford seemed to be confused as to how some of the evidence got into her office. Specifically, when asked about the fifty-four thousand dollar check from MetLife that was found in her office by Mr. Sullivan, Ms. Crawford replied that she did not know how the check got into her office. Ms. Crawford maintained that her office was open all the time and that she is often not the person in the office who opens the mail or distributes it. Ms. Crawford admitted that she did not know what the fifty-four thousand dollar check was for nor did she do any investigation during her employment relative to the receipt of the fifty-four thousand dollar check. Additionally, with regard to the checks from the State of Tennessee, Ms. Crawford stated that she had no idea the checks were in her office nor who put them there. The same response

was received when the question about the checks from the Educators Credit Union, the check from Ms. Ross, and the check from Mr. Lane. With regard to the checks from Prudential Securities and from Investors Diversified Services, Ms. Crawford alleged that the checks would have gone to the employee benefits department prior to receipt in her office and stated that no timeline existed for dispensing the checks once the information was received regarding the correct account in which the check should be deposited. Ms. Crawford did admit to having knowledge of very few of the checks, most notably the checks to Amy Bogle, Joel Grimes, James Green, and Donna Rice. Ms. Crawford claimed that once the checks were voided, it was a regular practice for the voided checks to be kept in a file cabinet or in her office. Ms. Crawford further testified that if a vendor check was voided then it was sent to the accounting office. Ms. Crawford claimed that nobody ever told her or reprimanded her for keeping voided checks in her office. Finally, Ms. Crawford reiterated that, in her opinion, her termination was retaliation for her claim of harassment against Dr. Gene Hughes.

Upon cross-examination Ms. Crawford admitted that she had been counseled by Mr. Bohnenstiel regarding timeliness in the performance of her duties. She further admitted that her office had been in vast disarray, however, on the day the auditors were present her office was, in her words, "immaculate." Ms. Crawford disagreed that there were various stacks of documents in her office and that certain documents in one stack may pertain to documents in another stack. She further stated that in reference to the fifty-four thousand dollar check, that any employee in the office would have handled the situation similar to the way she handled it. In fact, on further

examination, Ms. Crawford stated that she did not know anything about many of the articles that were found in her office and that someone else had "planted" them in her office.

CONCLUSION

After review of the testimony in this matter, it is the conclusion of this office that Vicky Crawford was justly terminated from employment with the Metropolitan School District. During the course of her testimony, Ms. Crawford exhibited an incredible lack of knowledge regarding the sensitive documents located in her office and offered very little explanation as to how the documents could have or should have been handled once they arrived either in her office or in the department she supervised. Ms. Crawford offered no proof to rebut the allegations contained in the charge letter except to say that she felt that her termination was a retaliation for allegations of sexual harassment that she had made against Dr. Gene Hughes, as well as stating that much of the evidence that was found in her office was "planted."

When asked on direct examination by her attorney why she had not followed proper procedure in reporting allegations of sexual harassment to her supervisor, Mrs. Crawford replied that she thought her supervisor, Mr. Bohnenstiel, was a "space cadet." I find that that this cavalier remark is representative of Mrs. [sic] Crawford's defense in this matter. The witnesses presented the evidence in a clear, cogent, and concise manner. The only defense offered to the charges and evidence presented is a complete denial of any knowledge or responsibility on the part of Mrs. [sic] Crawford for the irregularities. This is

further compounded by a glaring disrespect for those who were chosen to supervise and assist her with the difficulties that she experienced.

Based on the foregoing, it is the conclusion of this office that the termination of Vicky S. Crawford is justified and the recommendation of the Assistant Superintendent for Business and Facility Services regarding her termination is hereby AFFIRMED by the office of the Director of Schools.

ENTERED this 31 day of March, 2003.

/s/ Pedro Garcia
Dr. Pedro Garcia
Director of Schools

CHARGE OF DISCRIMINATION		
This form is affected by the Privacy Act of 1974. See enclosed Privacy Act Statement and other information before completing this form.		
Charge Presented To: ☐ FEPA ☒ EEOC		Agency(ies) Charge No(s): **253-2003-01716**
Tennessee Human Rights Commission and EEOC *State or local Agency, if any*		
Name (Indicate Mr., Ms., Mrs.) **Ms. Vicky S. Crawford**	Home Phone No. *(Incl. Area Code)* **(615) 506-1827**	Date of Birth **11-28-1952**
Street Address 723 Tobylynn Drive	City, State and Zip Code Nashville, TN 37211	
Named is the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, or State or Local Government Agency That I Believe Discriminated Against Me or Others. (*If more than two, list under PARTICULARS below.*)		
Name METRO BOARD OF EDUCATION	No. Employees, Members 500 or More	Phone No. (*Include Area Code*) (615) 259-8400
Street Address 2601 Bransford Avenue	City, State and Zip Code Nashville, TN 37204	
Name	No. Employees, Members	Phone No. (*Include Area Code*)
Street Address	City, State and Zip Code	
DISCRIMINATION BASED ON (*Check appropriate box(es).*) ☐ Race ☐ Color ☐ Sex ☐ Religion ☐ National Origin ☒ Retaliation ☐ Age ☐ Disability ☐ Other (*specify below*)		

DATE(S) DISCRIMINATION TOOK PLACE

Earliest	Latest
11-07-2002	03-31-2003

☐ CONTINUING ACTION

THE PARTICULARS ARE (*if additional paper is needed, attach extra sheet(s)*):

I. I was hired by Metropolitan Board of Education on September 14, 1972. I was contacted by my employer in June, 2002 to participate in a sexual harassment investigation. For this, I was suspended and then discharged, as well as others who participated. They employ over 501+ employees.

II. My former employer will say I embezzled monies and suspected of drug use. These allegations are false.

III. I believe that I was suspended then discharged in retaliation for my participation in a sexual harassment investigation, in violation of Title VII of the Civil Rights Act of 1964, as amended.

I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the above is true and correct.

Jun 24, 2003 /s/ Vicky S. Crawford

Date *Charging Party Signature*

NOTARY – *When necessary for State and Local Agency Requirements*

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (*month, day, year*)

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

DISMISSAL AND NOTICE OF RIGHTS

To: Vicky S. Crawford
723 Tobylynn Drive
Nashville, TN 37211

From: Nashville Area Office
50 Vantage Way
Suite 202
Nashville, TN 37228

[Filed Sep. 11, 2003]

☐ *On behalf of person(s) aggrieved whose identity is CONFIDENTIAL (29 CFR § 1601.7(a))*

EEOC Charge No.	EEOC Representative	Telephone No.
253-2003-01716	Sheila Ellis, Enforcement Sprv.	(615) 736-5820

THE EEOC IS CLOSING ITS FILE ON THIS CHARGE FOR THE FOLLOWING REASON:

☐ The facts alleged in the charge fail to state a claim under any of the statutes enforced by the EEOC.

☐ Your allegations did not involve a disability as defined by the Americans with Disabilities Act.

☐ The Respondent employs less than the required number of employees or is not otherwise covered by the statutes.

☐ Your charge was not timely filed with EEOC; in other words, you waited too long after the date(s) of the alleged discrimination to file your charge.

☐ Having been given 30 days in which to respond, you failed to provide information, failed to appear or be available for interviews/conferences, or otherwise failed to cooperate to the extent that it was not possible to resolve your charge.

☐ While reasonable efforts were made to locate you, we were not able to do so.

☐ You were given 30 days to accept a reasonable settlement offer that affords full relief for the harm you alleged.

☒ The EEOC issues the following determination: Based upon its investigation, the EEOC is unable to conclude that the information obtained establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issues that might be construed as having been raised by this charge.

☐ The EEOC has adopted the findings of the state or local fair employment practices agency that investigated this charge.

☐ Other (*briefly state*)

– NOTICE OF SUIT RIGHTS –

(*See the additional information attached to this form.*)

Title VII, the Americans with Disabilities Act, and/or the Age Discrimination in Employment Act: This will be the only notice of dismissal and of your right to sue that we will send you. You may file a lawsuit against the respondent(s) under federal law based on this charge in federal or state court. Your lawsuit **must be filed *WITHIN 90 DAYS* of your receipt of this Notice**; or your right to sue based on this charge will be lost. (The time limit for filing suit based on a state claim may be different.)

Equal Pay Act (EPA): EPA suits must be filed in federal or state court within 2 years (3 years for willful violations)

of the alleged EPA underpayment. This means that **backpay due for any violations that occurred *more than 2 years (3 years) before you file suit may not be collectible.***

On behalf of the Commission

/s/ [Illegible] for
Sarah L. Smith,
Area Director

Sep 10 2003
(*Date Mailed*)

Enclosures

cc: Pedro Garcia
Director of Schools
METRO BOARD OF EDUCATION
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109 (29) No. 06-1595

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In The
Supreme Court of the United States

VICKY S. CRAWFORD,

Petitioner,

v.

METROPOLITAN GOVERNMENT
OF NASHVILLE AND
DAVIDSON COUNTY TENNESSEE

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

REPLY BRIEF FOR PETITIONER

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ARGUMENT

The parties are in agreement as to what rule of law was adopted by the Sixth Circuit in this case.[1] The court of appeals held that an employee is not protected by Title VII from retaliation for having told her employer, during an internal investigation, that she was sexually harassed. Respondent insists that the holding was correct, and that neither the participation clause[2] nor the opposition clause[3] of section 704(a) prohibit an employer from firing a worker who in those circumstances objects to sexual harassment.

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[1] Respondent argues that, in resolving the merits of petitioner's factual assertion that she was dismissed because of her participation in the internal investigation, deference should be given to the factual conclusions of the EEOC office which investigated that charge. (Br. Opp., pp. 3, 4, 7.) Neither court below addressed this factual question, which has no bearing on the legal issue decided by the courts below and which is not properly before this Court.

Respondent argues that, were this case to proceed to trial, the trier of fact would conclude that Crawford was dismissed for misconduct, rather than in retaliation for her participation in the sexual harassment investigation. (Br. Opp., pp. 1-3.) The courts below did not address the sufficiency of the evidence to establish the alleged retaliatory motive; that issue has no bearing on the Question Presented and is not properly before the Court.

[2] Br. Opp. 4 ("participation in an in-house sexual harassment investigation prior to the commencement of an EEOC proceedings is not a protected activity under Title VII's 'participation clause' "); 6 ("participation in an in-house sexual harassment investigation, not undertaken while an EEOC charge is pending, is not a 'protected activity' under Title VII.").

[3] Br. Opp. 10 ("statements made in a single interview in an investigation initiated by someone else are not protected by the opposition clause"; "[i]n answering the investigator's questions, Ms. Crawford was not 'opposing' an employment practice she considered unlawful"); 14 (court of appeals correctly "[r]equir[ed] a plaintiff ostensibly engaging in 'opposition' conduct to actually, actively initiate a complaint").

The petition identified a series of decisions in the Third, Fifth, and Eighth Circuits which have upheld Title VII retaliation claims where the asserted protected activity, as here, was participation in an employer's internal investigation or review process. (Pet. 15-17). Respondent does not deny that those circuits have upheld such claims, but argues only that in at least some of those cases the employer may have failed to assert that such activity is not protected by section 704. (Br. Opp. 10-13). Regardless of the litigation tactics selected by the defendants in those cases, it is now the law of the circuit in the Third, Fifth and Eighth Circuits that workers cannot be retaliated against for taking part in an employer's internal investigation of sexual harassment or other discrimination. That is the rule of law that is binding on district courts and appellate panels in those circuits. With regard to the Eleventh Circuit, respondent does not actually dispute the authority set out in the petition which demonstrated that in that circuit Judge Edmondson's explanation of his opinion in *EEOC v. Total Systems Services Inc.*, 221 F.3d 1171 (11th Cir. 2002), is regarded as a definitive. (See Petition, pp. 18-19).

There are other circuits where, because of the Sixth Circuit decision in the instant case, it is now unclear whether an employee can be fired for answering her employer's questions about sexual harassment. In the wake of the decision below, an attorney, union representative or EEOC official in much of the nation can no longer with confidence advise a worker that it is safe to answer an employer's questions about sexual harassment. This critical legal issue emphatically is not a matter which should be left without definitive resolution while other circuits decide whether to follow the Sixth Circuit decision

in this case (and permit retaliatory dismissals) or to adhere to the plurality rule to the contrary.

Whatever might otherwise be the benefit of further airing this issue in the lower courts, continued uncertainty about this issue is simply intolerable. If, as the Sixth Circuit has held in the instant case, workers can lawfully be fired because in the course of an internal investigation they provided truthful information about sexual harassment, employees need to be warned about that danger without further delay. If, on the other hand, participation in such investigations is indeed protected activity, that should be clarified with dispatch, so that the Sixth Circuit decision will cease to interfere with participation in internal investigations in that circuit, and will not chill throughout much of the rest of the nation employee participation in such investigations. The very uncertainty created by the decision of the Sixth Circuit in this case poses a substantial obstacle to the correction of sexual harassment and other violations of federal employment statutes.

Respondent argues that the appropriate solution to this problem would be for the EEOC to bow to the decision of the Sixth Circuit panel, and immediately alter its web site to emphatically warn workers throughout the United States that they can be fired if they answer questions from their employer about sexual harassment (or other discrimination against) a co-worker. (Br. Opp. p. 17). On this approach, the control over the national standard regarding this key question of federal law would as a practical matter rest in the hands of the two circuit judges and one senior district court judge who happened to serve on a

particular panel in Sixth Circuit. Under Article III, however, the responsibility for establishing such national standards lies with this Court.

Whether deference should be accorded to the EEOC's views regarding the *merits* of the Question Presented is, at this juncture, premature. The issue at this stage is whether the inter-circuit conflict is one which warrants review by this Court, or whether the Question Presented is "an important question of federal law that has not been, but should be, settled by this Court." (Sup. Ct. Rule 10(c)). In deciding whether to grant review, due regard should be given to the intensely practical judgment of the EEOC – which bears the primary responsibility for enforcing Title VII – that protection of participation in employer internal investigation is essential both to "the EEOC's ability to enforce Title VII"[4] and to assuring that employers will "discover and prevent discriminatory practices in the workplace."[5] In *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997), this Court gave substantial weight to the EEOC's views regarding the degree to which enforcement of Title VII would be impeded by legalizing an entire category of retaliatory conduct.

This case presents an excellent vehicle for resolving this vital legal issue. The decision below rested squarely and solely on the question of whether section 704 of Title VII protects workers who take part in an employer's internal investigation. The Sixth Circuit (and the district court) held that such retaliation is permissible under both

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[4] Brief of the EEOC as Appellant, *EEOC v. Total Systems Services, Inc.*, 221 F.3d 1171 (11th Cir. 2000), No. 99-13196-JJ, pp. 17-18.

[5] EEOC Compliance Manual, section 914.003, part 8-II(B)(1).

the opposition clause[6] and the participation clause[7] of section 704(a). In the proceedings below, petitioner expressly and repeatedly raised both of the subsidiary legal issues that control that question - arguing that such conduct is protected by the opposition clause[8] and by the participation clause.[9]

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

In the alternative, the Solicitor General should be invited to file a brief in this case expressing the views of the United States.

---

[6] Pet. App., pp. 7a-8a, 15a.

[7] Pet. App., pp. 8a-9a, 16a-17a.

[8] Final Brief for Appellant, *Crawford v. Metropolitan Government of Nashville*, No. 05-5258, pp. 19-27; Petition for Rehearing and Suggestion for Rehearing En Banc, *Crawford v. Metropolitan Government of Nashville*, No. 05-5258, pp. 5-9.

[9] Final Brief for Appellant, *Crawford v. Metropolitan Government of Nashville*, No. 05-5258, pp. 36-37; Petition for Rehearing and Suggestion for Rehearing En Banc, *Crawford v. Metropolitan Government of Nashville*, No. 05-5258, pp. 13-16.

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File Date:
Dec 18 2007

(5)

No. 06-1595

In the Supreme Court of the United States

VICKY S. CRAWFORD, PETITIONER

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether, or to what extent, Title VII's anti-retaliation provision, Section 704(a) of the 1964 Civil Rights Act, 42 U.S.C. 2000e-3(a), protects an employee from being dismissed because she cooperated with her employer's internal investigation of sexual harassment.

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In the Supreme Court of the United States

No. 06-1595

VICKY S. CRAWFORD, PETITIONER

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to this Court's invitation to the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

1. Petitioner worked as a payroll coordinator for respondent for over 30 years. In the fall of 2001, respondent hired Dr. Gene Hughes as the Metro School District's employee relations director. Pet. App. 4a, 13a. In 2002, respondent, in accordance with its formal anti-harassment policy, initiated an internal investigation into Hughes's conduct after a lawyer in respondent's Legal Department learned that several employees had

"expressed concern about specific incidents of inappropriate behavior by Hughes." *Id.* at 4a.

The assistant director of human resources, Veronica Frazier, was assigned to investigate the allegations. Pet. App. 4a-5a. As part of respondent's investigation, Frazier interviewed several employees who worked with Hughes, including petitioner. *Id.* at 5a, 13a. Petitioner informed Frazier that Hughes had sexually harassed her and other employees. Specifically, petitioner reported that Hughes "had asked to see her titties on numerous occasions"; grabbed his genitals; "put his crotch up to [her] window"; and, once "came into her office * * * and he grabbed her head and pulled it to his crotch." *Id.* at 5a n.1.

The investigation did not result in any disciplinary action against Hughes. However, respondent subsequently fired petitioner, along with two other employees who alleged during the investigation that Hughes engaged in sexually harassing behavior. Pet. App. 5a. Respondent purportedly fired petitioner after accusing her of embezzlement and drug use but, according to petitioner, those accusations were unfounded. *Id.* at 5a-6a.

2. After filing a charge with the Equal Employment Opportunity Commission (EEOC), petitioner filed the instant suit, alleging that respondent violated Title VII by firing her because she disclosed Hughes's sexually harassing behavior during the internal investigation. Pet. App. 13a. The district court granted summary judgment in favor of respondent on the ground that petitioner's participation in the internal investigation of Hughes was not conduct covered by Title VII's anti-retaliation provision, Section 704(a), 42 U.S.C. 2000e-3(a). That provision makes it "an unlawful employment practice for an employer to discriminate against any of

his employees * * * [1] because [the employee] has opposed any practice made an unlawful employment practice by this subchapter, or [2] because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." *Ibid.* The first of the numbered clauses is known as the "opposition clause" and the second as "the participation clause."

Relying on Sixth Circuit precedent, the district court concluded that petitioner's participation in her employer's investigation did not fall within Title VII's *participation* clause because respondent's investigation was not conducted pursuant to a pending EEOC charge. Pet. App. 15a (citing *Abbott* v. *Crown Motor Co., Inc.*, 348 F.3d 537, 543 (6th Cir. 2003)). The district court further held that petitioner's involvement in the internal investigation did not constitute *opposition* to an unlawful employment practice, because she "merely answered questions by investigators in an already-pending internal investigation, initiated by someone else." *Id.* at 16a. Because there was no allegation that petitioner "instigated or initiated any complaint," the district court concluded, petitioner's activity was not opposition within the meaning of Section 704(a). *Id.* at 16a-17a.

3. The court of appeals affirmed in an unpublished decision. Pet. App. 3a-10a. The Sixth Circuit concluded that petitioner's actions were not protected under Section 704(a)'s *opposition* clause. In so holding, the court stated that "[t]he general idea is that Title VII 'demands active, consistent "Opposing" activities to warrant * * * protection against retaliation.'" *Id.* at 7a (quoting *Bell* v. *Safety Grooving & Grinding, LP*, 107 Fed. Appx. 607, 610 (6th Cir. 2004) and citing *Johnson* v. *University of Cincinnati*, 215 F.3d 561, 579 (6th Cir.),

cert. denied, 531 U.S. 1052 (2000)). The court further reasoned that petitioner's actions in "relating unfavorable information about Hughes" during the investigation did not qualify as "overt opposition" protected under the statute because petitioner "does not claim to have instigated or initiated any complaint prior to her participation in the investigation, nor did she take any further action following the investigation and prior to her firing." *Id.* at 7a-8a.

The court of appeals also held that petitioner's actions were not protected under Section 704(a)'s *participation* clause. Pet. App. 8a. The court reasoned that Title VII protects an employee's participation in an employer's internal investigation into allegations of unlawful discrimination only when that investigation occurs pursuant to a pending EEOC charge. *Ibid.* In this case, the court explained, "no EEOC charge had been filed at the time of the investigation or prior to her filing." *Ibid.*

4. Petitioner sought panel and en banc rehearing, which was denied. Pet. App. 1a-2a.

DISCUSSION

Petitioner's disclosure of discriminatory acts during respondent's internal investigation into possible sexual harassment in the workplace was protected activity under Section 704(a). The court of appeals therefore erred in holding that neither clause of Section 704(a) protected petitioner. The court of appeals' construction of Section 704(a) creates an unjustified gap in Title VII's protection against retaliation. Internal investigations are an integral aspect of Title VII and there is no reason to leave cooperating witnesses unprotected. The Sixth Circuit's rule is not only at odds with the text of Section

704(a) but with its object and the EEOC's guidance materials.

The court of appeals' decision is out of step with the precedent in other circuits, but does not squarely conflict with other circuit precedents. Nevertheless, even in the absence of a square conflict, the question presented is of sufficient importance to the effective enforcement of Title VII to warrant resolution by this Court. In particular, the court of appeals' failure to protect employees in internal investigations that precede formal complaints raises significant concerns in light of this Court's decisions in *Faragher* v. *City of Boca Raton*, 524 U.S. 775 (1998), *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998), and *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526 (1999), which impose an affirmative duty on employers routinely to investigate allegations of sexual harassment to avoid liability or limit damages under Title VII.

Although the unpublished nature of the decision below counsels against plenary review, the court of appeals grounded its construction of Section 704(a) in prior circuit precedent in published cases, establishing general ramifications for interpreting Section 704(a), which the court in this case and in a previous unpublished case viewed as controlling in this specific context. In addition, notwithstanding that it is unpublished, the court of appeals' decision creates an inexplicable enforcement gap in Title VII for employees in the Sixth Circuit and threatens to compromise employer investigations into potential discriminatory conduct by removing a protection designed to ensure that employees will not fear reprisals for cooperating in such investigations, to the detriment of employers seeking to uncover wrongdoing as well as employees subject to such wrongdoing.

A. The Court Of Appeals Erred In Holding That Petitioner's Conduct Was Not Protected Activity Under Title VII's Anti-Retaliation Provision

1. The court of appeals erred in finding that Section 704(a) did not protect petitioner against retaliation for adverse testimony in an internal investigation that predated any filing of an EEOC charge. The United States takes the view that petitioner is protected by both the opposition and participation clauses of Section 704(a). But it makes no sense to conclude, as the court of appeals did, that petitioner is not protected by *either* clause. A cooperating witness, no less than an employee who initiates a complaint, needs protection against retaliation for providing candid information to the employer during an internal investigation.

Internal investigations, by virtue of this Court's decisions, are an integral part of Title VII's enforcement scheme. Recovery by employees and liability for employers can turn on the existence of the adoption of internal complaint policies and the extent to which the employee avails herself of such procedures. Thus, internal procedures can only play the role that the Court envisioned if employees who give candid testimony are protected against retaliation. The need for protection does not turn on whether an EEOC charge has been filed at the point the witness testifies. The court of appeals' ruling thus creates an inexplicable gap in Title VII's protection against retaliation that this Court should correct.

2. Section 704(a) protects employees from retaliation because he has "opposed" an unlawful employment practice. 42 U.S.C. 2000e-3(a). The plain meaning of the word "oppose" is "to be hostile or adverse to, as in opinion." *Random House Dictionary of the English Lan-*

guage 1359 (2d ed. 1987); *American Heritage Dictionary* 872 (1982) ("[t]o be in contention or conflict with" or "[t]o be resistant to"). When an employee communicates to her employer a belief that the employer has engaged in activity that constitutes a form of employment discrimination, that communication reasonably carries with it the employee's opposition to the activity. See 2 EEOC Compl. Man. (BNA) § 8-II(B)(1), at 614:0003 (Mar. 2003) (opposition clause "applies if an individual explicitly or implicitly communicates to his or her employer or other covered entity a belief that its activity constitutes a form of employment discrimination"); *id.* § 8-II(B)(2), at 614:0003 (protected opposition occurs when a "complaint would reasonably [be] interpreted as opposition to employment discrimination"). An employee's disclosure of unlawful activity in response to the employer's investigation to root out unlawful activity is naturally viewed as opposition to that activity, because no reasonable employee welcomes discrimination in the workplace, especially when it is directed at the employee herself.

This case well illustrates the point. Respondent initiated an investigation after several employees expressed concern about sexual harassment by Hughes. Pet. App. 4a. Petitioner was interviewed as part of that investigation, and was asked in the investigation to report "any *inappropriate* behavior by Mr. Hughes." C.A. App. 46 (Dep. of Vicki Crawford) (emphasis added); accord *id.* at 47. Petitioner then reported that she had "*felt very uncomfortable* around Mr. Hughes" because he "would grab himself" whenever she would speak to him. *Id.* at 44 (emphasis added). Petitioner also reported that Hughes would respond to her question of "what's up?" by grabbing his crotch and saying "you know what's up,"

id. at 45; that he would knock on the window to her office and would press his crotch to the window," *ibid.*; that at times, "he would come to my window * * * and would say, "Let me see your titties," *ibid.*; and that he once walked into her office, and when she asked how could she help him, "he grabbed her head and pulled it to his crotch." Pet. App. 5a n.1.

Petitioner's disclosure during the interview of such reprehensible conduct unmistakably communicated her opposition to Hughes's conduct. After recounting such graphic and obviously inappropriate acts against her in response to a request to report inappropriate behavior, petitioner was not required to make explicit that she opposed such conduct before coming within Section 704(a)'s protection. The nature of the conduct described and the setting of the internal investigation sufficed to register petitioner's opposition to the conduct. Indeed, petitioner reasonably believed that by reporting Hughes's misconduct during a formal investigation, she had "testified *against*" Hughes. C.A. App. 47; accord Pet. App. 5a ("According to petitioner, she believed that she was exercising her rights under federal law when she informed Frazier of Hughes's actions."). And in any event, the Congress that passed Title VII would have assumed that employees who reported such misconduct *opposed* such misconduct. Petitioner's recital of specific instances of unlawful conduct by Hughes during the course of her employer's investigation was therefore protected activity under the opposition clause.

The court of appeals believed that the opposition clause "demands active, consistent 'Opposing' activities to warrant * * * protection against retaliation." Pet. App. 7a (quoting *Bell*, 107 Fed. Appx. at 610). But Section 704(a) protects those who "oppose[]"; the terms

"active" and "consistent" nowhere appear in the text of the statute. The court of appeals likewise engrafted an extra-textual gloss on the statute by holding that petitioner was not covered by the opposition clause because respondent initiated the interview in which petitioner complained of Hughes's harassing conduct. *Ibid.* Whether an employee receives protection under Title VII's anti-retaliation provision does not depend on whether the employee initiated an interview—instead of cooperating with an interview request—in which the employee complained of unlawful conduct. The statutory touchstone is opposition, not initiation.

Such a requirement would ignore the practical reality that many employees do not *initiate* complaints of discrimination precisely because they fear retaliation. *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors*, 2 EEOC Compl. Man. (BNA) Pt. V(C)(1)(b) at 615:0108 n.59 (Oct. 2002) ("Surveys have shown that a common reason for failure to report harassment to management is fear of retaliation * * * [and] a significant proportion of harassment victims are worse off after complaining.") (citations omitted); see, *e.g.*, C.A. App. 47 (petitioner's testimony that "I felt afraid that if I testified against him * * * I would lose my job"). Thus, the relevant inquiry in this context is whether the employer reasonably should have understood that the employee was disclosing an employment practice made unlawful by Title VII. 42 U.S.C. 2000e-3(a). 2 EEOC Compl. Man. (BNA) § 8-II(B)(2); accord *EEOC Interpretive Manual, Reference Manual to Title VII Law for Compliance Personnel* § 493.2 (1972) (individual protected from retaliation if "the circumstances surrounding the complaints were such that [the employer] knew or should have known

that [the individual] was complaining about Title VII discrimination."). When that criteria is satisfied, Title VII protects the employee against retaliation.

For the same reasons, Section 704(a) does not require an employee to take "further action" in opposition beyond complaining about unlawful activity to an employer. Pet. App. 7a. Voicing opposition to an employer about suspected unlawful activity constitutes protected opposition, whether or not she has filed a formal or informal complaint. See, *e.g.*, *Kotcher* v. *Rosa & Sullivan Appliance Ctr., Inc.*, 957 F.2d 59, 65 (2d Cir. 1992) (opposition encompasses an individual's complaints to supervisors regardless of whether she also files an EEOC charge); *Pastran* v. *K-Mart Corp.*, 210 F.3d 1201, 1205 (10th Cir. 2000) (same); *Rollins* v. *State of Fla. Dep't of Law Enforcement*, 868 F.2d 397, 400 (11th Cir. 1989) (opposition clause protects "those * * * who informally voice complaints to their supervisors"); *Armstrong* v. *Index Journal Co.*, 647 F.2d 441, 448 (4th Cir. 1981) (same). Here again, the statutory trigger is "opposi[tion]"; the statute does not require employees to take further action, such as filing a formal a complaint, *in addition to* expressing her opposition to discriminatory conduct.

3. Although it presents a closer question, the court of appeals also erred when it held that Section 704(a)'s *participation* clause is limited to participation in an employer's internal investigation only when that investigation follows the filing of an EEOC charge. The text of the participation clause covers participation in "an investigation * * * under this subchapter." An employer-initiated investigation designed to detect or root out discrimination prohibited by Title VII is reason-

ably construed in these circumstances to be an investigation "under" the statute.

No appellate decision has limited the phrase "investigation * * * under this subchapter" to EEOC investigations. In addition, Congress elsewhere in Title VII used language making clear its intent to address only investigations conducted by the Commission. See 42 U.S.C. 2000e-5(b) ("the Commission * * * shall make an investigation" of a charge), 2000e-8 (access by Commission "[i]n connection with any investigation of a charge"), and 2000e-9 (referring to "hearings and investigations conducted by the Commission or its duly authorized agents or agencies"). The fact that Congress did not use such Commission-specific language in Section 704(a) suggests that employer-initiated investigations into conduct proscribed by Title VII would be covered. The court of appeals did not attempt to limit the participation clause to EEOC's own investigations, but did limit protection to internal investigations that follow the filing of an EEOC charge. There is no basis for that temporal limitation.

When an employer conducts an internal investigation into whether a Title VII violation has occurred, before or after the filing of an EEOC charge, the employer acts in conformity with Title VII's central objective to prevent and deter harm. See *Faragher*, 524 U.S. at 806 (Title VII's "'primary objective', like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm.") (quoting *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417 (1975)); *Ellerth*, 524 U.S. at 764 ("Title VII is designed to encourage the [employer's] creation of antiharassment policies and effective grievance mechanisms."); *Kolstad*, 527 U.S. at 546 (recognizing "Title VII's objective of motivat[ing] em-

ployers to detect and deter Title VII violations"); accord *McKennon* v. *Nashville Banner Publ'g Co.*, 513 U.S. 352, 358 (1995).

A rule limiting protection against retaliation in pre-charge internal investigations is difficult to square with this Court's precedents interpreting Title VII to impose an affirmative duty on employers to investigate allegations of sexual harassment to avoid liability under the statute. For example, this Court in *Faragher* and *Ellerth* held that an employer can assert an affirmative defense to avoid vicarious liability for its supervisor's unlawful employment actions that do not result in a tangible employment action if (1) "the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and (2) "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer." *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765. Likewise, in *Kolstad*, 527 U.S. at 545-546, the Court held that an employer could avoid punitive damages under Title VII by showing that the supervisor was acting contrary to the employer's good faith efforts to comply with Title VII.

An employer's investigation into allegations of conduct made unlawful by Title VII is a fundamental and indispensable component of an employer's good faith efforts to comply with Title VII through the development and implementation of anti-harassment policies and complaint procedures. See *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors*, 2 EEOC Compl. Man. (BNA) Pt. V(C)(1), at 615:0107 (Oct. 2002) ("An anti-harassment policy and complaint procedure should contain, at a minimum * * * [a] complaint process that provides a

prompt, thorough, and impartial investigation."). In light of the importance of the internal investigation process to Title VII liability, it would make no sense to leave employees unprotected in that process. Employee cooperation is essential to making such internal investigations effective, yet employee cooperation will hardly be forthcoming if employees are unprotected against retaliation in the event they provide unfavorable information about their supervisors. Without such protection, employees will avoid negative comments about their supervisors and the internal investigation will be robbed of its value. Because employer-initiated investigations attendant to an employer's anti-harassment policies and procedures are so integral to achievement of the statutory goals of promoting employer compliance and avoiding harm, and, because those internal investigations will not perform the function envisioned by *Faragher* and *Ellerth* if the candor of cooperating employees is unprotected, such investigations are reasonably considered to be conducted pursuant to, and thus "under," Title VII.

In light of those principles, when respondent's legal department launched an investigation into Hughes's conduct, employees cooperating in that investigation were entitled to protection under the participation clause. Whether or not a victim of Hughes's conduct had filed a formal charge at the point of petitioner's interview does not change the fact that the investigation was within the purview of Title VII. Indeed, if one of respondent's employees sued respondent based on Hughes's conduct, respondent presumably would point to the investigation as part of its defense to vicarious liability. In such a case, respondent's defense under *Faragher* and *Ellerth* would not turn on whether the charge had

been filed before petitioner's interview. Employers should not be permitted to use such an investigation as a shield to liability under Title VII but at the same time as a sword to bar employees from seeking relief if they are fired in retaliation for their participation in the same interview. Such a result would flout the purpose of Title VII to "prohibit[] employer actions that are likely 'to deter victims of discrimination from complaining to' * * * their employers." *Burlington N. & Santa Fe Ry.* v. *White*, 126 S. Ct. 2405, 2415 (2006) (quoting *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 346 (1997)).

Moreover, such an interpretation of Section 704(a) would lead to the perverse result that employers could use investigations under facially appropriate anti-harassment policies as a means of identifying and rooting out employees who have knowledge of discrimination in the workplace, as opposed to identifying and fostering action against those who discriminate. Indeed, in this case, the employer fired three of the witnesses (including petitioner) who cooperated with the investigation, but ultimately allowed the subject of the investigation (Mr. Hughes) to remain in place. See p.2, *supra*.

For similar reasons, the court of appeals erred in concluding that protecting petitioner from retaliation under Section 704(a)'s participation clause would unjustifiably burden employers who "proactively" launch an investigation before an EEOC charge is filed. Pet. App. 10a. As discussed, this Court's decisions require proactive efforts on the part of employers regardless of whether an employee has instituted formal proceedings with the EEOC arising out of the conduct under investigation. In any event, employers have no legitimate interest in retaliating against employees who disclose conduct made unlawful under Title VII, either *before or*

after an EEOC charge is filed. And, consistent with this Court's decisions in *Faragher* and *Ellerth*, both employers and employees alike benefit from a system in which employees cooperate in internal investigations.

B. While There Is No Square Conflict, The Sixth Circuit's Decision Is An Outlier In The Circuits

1. The court of appeals' decision in this case is out of step with the decisions of other circuits on the scope of Section 704(a) and creates an inexplicable gap in the statute's prohibition against retaliation. No other circuit has adopted such a circumscribed interpretation of Section 704(a). Nevertheless, the decision is unpublished and does not create a square conflict on either the opposition or participation clause issue.

A. Although the court of appeals' decision appears to be the only appellate decision holding that the opposition clause requires active, consistent, or overt opposition to receive protection under Section 704(a), that decision does not squarely conflict with the decision of any other court of appeals.

In *EEOC* v. *Total System Services, Inc.*, 221 F.3d 1171 (2000), the Eleventh Circuit assumed, for the sake of argument, that an employee's cooperation in the employer's internal investigation was protected activity under the opposition clause. But the court did not need to resolve the issue squarely because it concluded that the district court nonetheless properly granted summary judgment for the employer on the merits. *Id.* at 1175 ("But, even if her acts might otherwise have constituted protected expression under the opposition clause, the district court was correct in granting summary judgment for Defendant."); accord *EEOC* v. *Total Sys. Servs.*, 240 F.3d 899, 904 (11th Cir. 2001) (Edmonson, J.

concurring) (observing that the panel's decision recognized that a plaintiff who participates in an employer's internal investigation "might have protection" under the opposition clause).*

As petitioner points out (Pet. 15-20), there are decisions in other circuits holding that complaints made during an employer's internal investigation constituted protected activity covered by Section 704(a), but none of those decisions specifically addresses whether the opposition clause or participation clause covered the activity and, accordingly, those cases do not directly conflict with the Sixth Circuit's analysis of the two clauses. Moreover, perhaps because they do not focus specifically on the participation clause, those decisions do not make clear whether the employer's internal investigation was being conducted pursuant to a charge filed with the EEOC, in which case the conduct would be covered under the participation clause even under the Sixth Circuit's approach. *Cardenas* v. *Massey*, 269 F.3d 251, 260, 263 (3d Cir. 2001); *Evans* v. *City of Houston*, 246 F.3d 344, 352-353 (5th Cir. 2001); *Scott* v. *County of Ramsey*, 180 F.3d 913, 916 (8th Cir. 1999). Accordingly, while those decisions are in substantial tension with the Sixth Circuit's decision, they do not squarely conflict with that decision.

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* Petitioner also suggests (Pet. 19) that district courts have construed the Eleventh Circuit's decision as holding that the *opposition* clause would cover petitioner's conduct. The decision that she cites for that proposition, *MacLean* v. *City of St. Petersburg*, 194 F. Supp. 2d 1290, 1298 (M.D. Fla. 2002), however, relies on a dissenting opinion from Judge Barkett expressing the view that such conduct would be covered by the *participation* clause. *EEOC* v. *Total Sys. Servs.*, 240 F.3d at 903 (Barkett, J., dissenting).

Petitioner also relies on decisions (Pet. 15-17) in which the activity likely would have constituted opposition activity under the Sixth Circuit's stringent "active" opposition test. Thus, in *Cardenas*, 269 F.3d at 260, the plaintiff not only supported the discrimination complaints of his co-workers but filed his *own* complaint alleging discrimination. In *Kempcke* v. *Monsanto Co.*, 132 F.3d 442, 445 (8th Cir. 1998), the plaintiff gave arguably incriminating documents to his attorney and told his employer if it wanted the documents returned it would have to deal with his attorney. And in *Hoffman* v. *Rubin*, 193 F.3d 959, 963 (8th Cir. 1999), the court assumed, but did not hold, that the plaintiff's appearance on the show "60 Minutes" was oppositional activity. While the courts found that the employees were covered by Section 704(a) in those circumstances, those cases did not squarely address the more typical fact pattern here, in which an employee who has not yet filed an EEOC charge cooperates with an employer's investigation.

Petitioner also argues (Pet. 19-20) that the Seventh Circuit in *McDonnell* v. *Cisneros*, 84 F.3d 256 (1996), rejected the view that the opposition clause only protects "active" opposition. In *McDonnell*, the employee claimed he was being retaliated against for "failing to carry out his employer's desire that he prevent his subordinates from filing discrimination complaints." *Id.* at 262. The court concluded that the employee's failure to act amounted to "[p]assive resistance" but was nonetheless covered by the opposition clause. *Ibid.* In *McDonnell*, however, the Seventh Circuit did not confront whether an employee's cooperation with an internal investigation constitutes protected activity.

b. There is likewise no circuit conflict on the question whether the participation clause requires the filing

of an EEOC charge in order for an employer's internal investigation to constitute an "investigation * * * under this subchapter." 42 U.S.C. 2000e-3(a). On this issue, the Sixth Circuit's view is in line with the decisions of other circuits that likewise have concluded that the participation clause is triggered only after an EEOC charge has been filed. *Abbott*, 348 F.3d at 543; *EEOC* v. *Total Sys. Serv.*, 221 F.3d at 1174 n.2; *Byers* v. *Dallas Morning News*, 209 F.3d 419, 428 (5th Cir. 2000); *Brower* v. *Runyon*, 178 F.3d 1002, 1006 (8th Cir. 1999); *Vasconcelos* v. *Meese*, 907 F.2d 111, 113 (9th Cir. 1990); *Booker* v. *Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1313 (6th Cir. 1989).

C. The Question Whether Petitioner Is Protected Under Title VII's Anti-Retaliation Provision Is An Important And Recurring Issue That Warrants This Court's Review

Although there is no square circuit conflict on the meaning of either Section 704(a)'s opposition clause or the participation clause, the question whether an employee in petitioner's circumstance is covered under Section 704(a) is of core importance to the effective enforcement of Title VII and of recurring significance. The decision below creates an inexplicable gap in Title VII's anti-retaliation provision. In light of the integral role internal investigations play in Title VII even before a charge is filed, it makes no sense to conclude that employees are protected by neither clause of Section 704(a). If the decision below is correct, there is every reason to think that Congress would want to act promptly to correct the anomaly. Accordingly, there is little reason to leave employees in the Sixth Circuit unprotected while awaiting a square conflict, or a published decision correcting the error in this case. More-

over, because the decision below squarely addressed both clauses, it presents a suitable vehicle to consider the question.

1. The court of appeals held that Title VII gives no protection to employees who are retaliated against for disclosing discriminatory conduct during employer-initiated investigations, at least in the absence of an EEOC charge. That result imposes a significant and unwarranted limitation on the types of conduct that Title VII is intended to protect. As this Court recently explained in *White*, 126 S. Ct. at 2412, the purpose of the anti-retaliation provision is to secure a discrimination-free workplace "by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of [Title VII's] basic guarantees." Title VII thus "forbids discrimination against * * * employees for attempting to protest or correct allegedly discriminatory conditions of employment." *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 796 (1973). This Court's precedents accordingly hold that Title VII should be interpreted to "assure * * * cooperation" from employees in achieving Title VII's objectives. *White*, 126 S. Ct. at 2414.

Effective enforcement of Title VII's protections depends "upon the cooperation of employees who are willing to * * * act as witnesses" and who feel "free to approach officials with their grievances." *White*, 126 S. Ct. at 2414 (quoting *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960)). In the absence of protection against retaliation, witnesses and victims would be understandably reluctant to participate in an investigation into unlawful conduct, which, in turn, would undermine Title VII's purpose to spur employers' efforts to deter and detect unlawful discrimination in the

workplace. And the court of appeals' decision unjustifiably puts an employee asked to disclose specific incidents of unlawful discrimination in a pre-charge internal investigation in an untenable position. The employee risks retaliation for disclosing the unlawful activity or for refusing to cooperate with the employer's investigation. The only safe course for the employee would be to provide only innocuous information about the supervisor, even when discrimination is rampant. No employee should be placed in that position. Nor should any employer welcome a system in which employees have a disincentive—*i.e.*, the possibility of retaliation not covered by Title VII—to cooperate with ongoing investigations designed to root out discrimination and, thus, avoid potential liability under Title VII. Accordingly, both employers and employees would benefit from guidance from this Court on the question presented.

2. The question of whether Title VII's anti-retaliation provision protects an employee's disclosure of unlawful conduct during an employer-initiated investigation has arisen with increasing frequency, and has taken on greater importance, following this Court's decisions in *Ellerth*, *Faragher*, and *Kolstad*. As discussed, those decisions create strong incentives for employers to implement policies and procedures that would identify and correct instances of unlawful discrimination as a means to avoid liability or limit damages under Title VII; employees also must avail themselves of such procedures in order to obtain relief under Title VII's anti-discrimination provisions.

Not surprisingly, employers have responded to the decisions by implementing or expanding their policies and internal complaint procedures. See, *e.g.*, Amicus Chamber of Commerce Br. at *2, *Pennsylvania State*

Police v. *Suders*, 542 U.S. 129 (2004) (No. 03-95) ("Following this Court's decisions in *Faragher* and *Ellerth* * * *, employers have made great strides in * * * implementing zero-tolerance policies, establishing user-friendly, effective internal complaint procedures, and vigorously investigating complaints of sexual and other harassment in the workplace."); Jathan W. Janove, *The Faragher/Ellerth Decision Tree*, 48 HR Mag. (Sept. 2003) ("There is no question that [*Faragher* and *Ellerth*] have increased employer understanding of the importance of preventive measures. They have contributed to the development of sound anti-harassment policies [and] procedures.").

As employers have begun routinely to conduct investigations into sexual harassment in the workplace, it is essential that a clear rule is established to determine whether Title VII protects an employee from retaliation because she discloses unlawful conduct during the course of the employer's investigation. The framework envisioned by *Ellerth*, *Faragher*, and *Kolstad*, *supra*, depends on participation and truthful cooperation by employees during employer-sponsored investigations. If employees are afraid to report instances of harassment or to participate in employer investigations out of fear of retaliation, employers may not become fully aware of harassment, thereby preventing them from taking corrective action. Moreover, because employee participation in employer-instituted procedures and corollary investigations can, in essence, be a prerequisite to the employee's assertion of Title VII rights, coverage of such participation is equally necessary to achieve "'unfettered access' to Title VII's remedial mechanisms." *White*, 126 S. Ct. at 2415 (quoting *Robinson*, 519 U.S. at 346). Encouraging employers to conduct internal inves-

tigations and requiring employees to comply with those procedures, but then denying protection against retaliation to employees who disclose unlawful conduct in the course of such investigations, would frustrate the purposes of Title VII as contemplated by this Court.

The court of appeals observed that an employer that retaliates against an employee who has participated in an internal investigation might be acting unreasonably and would risk losing its affirmative defense to a claim under Title VII's anti-discrimination provisions. Pet. App. 9a-10a. That observation offers no relief, however, to the victims of *retaliation* who would have no cause of action to vindicate that distinct injury under the statute. And if no victim of harassment files suit (*e.g.*, out of fear of reprisal), both the harassment and the retaliation would occur without redress. Moreover, the court of appeals' exclusive focus on the *employer's* motivations ignores the obvious chilling effect that its rule would have on an employee's willingness to cooperate with the employer's investigation.

3. The fact that the Sixth Circuit's decision is unpublished would normally counsel heavily against plenary review. Here, however, it appears that the decision reflects an entrenched view in the circuit. The decision in this case itself relies on a published decision, *Johnson*, 215 F.3d at 579, as well as on a previous unpublished Sixth Circuit decision issued several years ago, *Bell*, 107 Fed. Appx. at 610, that articulated a narrow standard for protection under the opposition clause. Pet. App. 7a. *Bell*, 107 Fed. Appx. at 610, in turn, expressed the view that published circuit precedent, including *Johnson*, "demands active, consistent 'opposing' activities to warrant [Section 704(a)] protection against retaliation." Accordingly, the Sixth Circuit has twice indicated that

it views circuit precedent as requiring that the opposition clause demand "active" and "consistent" activities in addition to opposition to unlawful activity. And as to the participation clause, the decision here relies on a published decision of the circuit. Pet. App. 7a-8a. Moreover, petitioner filed a petition for rehearing and rehearing en banc, with no success.

While the unpublished nature of the decision below and the absence of any published Sixth Circuit precedent on the particular application of the opposition clause at issue in this case would normally counsel against certiorari, the unpublished decision in this case is built on existing precedent (including another unpublished decision) that makes it likely that the decision will have staying power, and, in the meantime, the decision creates an anomalous gap in Title VII's enforcement scheme. On balance, this Court's certiorari jurisdiction is warranted to resolve the important question presented concerning the proper enforcement of Title VII. See, *e.g.*, *NLRB* v. *Scrivener*, 405 U.S. 117, 118 (1972) (observing that certiorari was granted to review scope of retaliation provision under National Labor Relations Act, 29 U.S.C. 157, because it "appeared to have an important impact on the administration of the Act").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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In the Supreme Court of the United States

VICKY S. CRAWFORD,

Petitioner,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The National Employment Lawyers Association (NELA) is the only professional membership organization in the country comprised of lawyers who represent employees in labor, employment, and civil rights disputes. NELA and its 67 state and local affiliates have a membership of over 3,000 attorneys committed to working for those who have been illegally treated in the workplace. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. NELA advocates for employee rights and workplace fairness, while promoting the highest standards of professionalism, ethics, and judicial integrity.

NELA is interested in this case, and is filing a Petition in support of Petitioner Vicky S. Crawford because of the potential detrimental effects that the Sixth Circuit's decision, if left intact, will have on workers' rights and employers' responsibilities regarding sexual harassment investigations. The Sixth Circuit's narrow interpretation of "protected activity" for purposes of Title VII's anti-retaliation provision conflicts with precedent from this Court regarding the scope of, and protections afforded under, Section 704(a) of Title VII. Thus, this Court must grant Crawford's petition for certiorari to decide the appropriate manner in which to determine if particular conduct is protected under the "opposition" and "participation" clauses of Section 704(a), in

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[1] Pursuant to Rule 37.6, NELA submits that no counsel for any party participated in the authoring of this document, in whole or in part. In addition, no other person or entity, other than NELA, has made any monetary contribution to the preparation and submission of this document. Pursuant to Rule 37.2, letters consenting to the filing of this Brief have been filed with the Clerk of the Court.

light of Congress's intent in passing this provision, and the manner in which this Court has repeatedly held that Title VII is to be interpreted.

SUMMARY OF THE ARGUMENT OF AMICUS CURIAE

This case presents a critical question of federal law that this Court has not previously addressed, but must now address in order to restore proper balance to Section 704(a) of Title VII, which prohibits employers from retaliating against employees who oppose unlawful practices, or participate in various types of Title VII proceedings. In this case, the Sixth Circuit has essentially held that employers are free to terminate employees who provide truthful information to their employers during an internal sexual-harassment investigation of a co-worker's complaint.

This decision must be reviewed because it is contrary to this Court's prior decisions recognizing and construing the broad remedial purposes of Title VII's anti-retaliation provision. As recently as 2006, in *Burlington Northern & Santa Fe Railway Co. v. White*, this Court recognized that one of the goals of Section 704(a) is to provide unfettered access to the broad remedies available under Title VII, and that enforcement of Title VII's anti-discrimination provisions depends, in large part, on witnesses who are willing to provide information without fear of reprisal.

The Sixth Circuit's decision also directly conflicts with this Court's pronouncements regarding the manner in which the statutory language of Title VII is to be construed. Instead of interpreting the language broadly, in keeping with this Court's precedent, the Sixth Circuit engrafted onto the language of Section 704(a) narrow restrictions that are simply

not present in the statutory text, and that are wholly inconsistent with the purposes of Title VII and Section 704(a).

By severely restricting the types of conduct that are protected under Section 704(a) of Title VII, the Sixth Circuit's decision eviscerates the holding in *Burlington Northern* regarding what amounts to "adverse action" under Section 704(a), and creates a *prima facie* test that is unworkable for employers and employees, alike. Moreover, the Sixth Circuit's decision will create a scenario where victims of, and witnesses to, sexual harassment will have no choice but to deluge the EEOC with "preemptive" charges, for the sole purpose of protecting themselves from retaliation for either reporting sexual harassment, or complying with an employer's internal investigation of a harassment complaint.

Because the Sixth Circuit's decision so severely restricts the types of employee conduct that are protected by Title VII's anti-retaliation provisions, it will have far-reaching and deleterious effects on employees' and employers' interests in identifying and preventing sexual harassment – and other types of unlawful discrimination – in the workplace. Accordingly, NELA respectfully requests that this Court grant the petition for certiorari and hear this case.

ARGUMENT

NELA, as *amicus curiae*, respectfully requests that this Court grant Vicky S. Crawford's petition for certiorari because this case involves an important question of federal law that requires resolution by this Court. At least three other federal circuits have taken the same overly restrictive view of Title VII's anti-retaliation provision as the Sixth Circuit has in this case.

These decisions severely threaten the efficacy of Section 704(a) of Title VII, especially in light of recent precedent from this Court, and will create havoc for the EEOC, which must enforce Title VII in all jurisdictions. Accordingly, this Court must now resolve the manner in which lower courts must construe employee conduct to determine whether it is the type of conduct that Congress intended to protect under Title VII's anti-retaliation provision.

I. Whether a witness's providing information during an employer's internal sexual-harassment investigation amounts to protected activity under Section 704(a) of Title VII is an important question of federal law that must now be settled by this Court because the Sixth Circuit's narrow interpretation of the "participation" and "opposition" clauses conflicts with this Court's prior cases recognizing the broad remedial purposes of Section 704(a).

Section 704(a) of Title VII of the Civil Rights Act of 1964 prohibits employers from retaliating against individuals who oppose practices that are unlawful under Title VII, or who participate in Title VII proceedings:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees...because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a) (2007).

In order to establish a *prima facie* case of retaliation under Section 704(a), an employee must show that: (1.) he or she engaged in protected activity; (2.) the employer knew that the employee engaged in this protected conduct; (3.) the employer subsequently took an adverse employment action against the employee; and (4.) there is a causal connection between the protected activity and the adverse employment action. *E.g., Abbott v. Crown Motor Co., Inc.*, 348 F.3d 537, 542 (6th Cir. 2003).

According to this Court, the first step in interpreting the statutory language of Title VII is to determine whether the statute is ambiguous in light of both the plain meaning of its terms and the statutory scheme:

> Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. Our inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent.

Robinson v. Shell Oil Co., 519 U.S. 337, 340, 117 S. Ct. 843 (1997). If the statutory language is ambiguous, then that language must be construed in a manner that is consistent with the statutory scheme, including its purpose. *See id.* at 345-46.

In *Burlington Northern & Santa Fe Ry. Co. v. White*, ___ U.S. ___, 126 S. Ct. 2405 (2006), this Court examined the third prong of the *prima facie* case, and how to determine whether certain employment actions are "adverse" in light of the purposes of Section 704(a). Discussing Title VII's anti-discrimination provisions, this Court explained that a workplace free from discrimination based on race, ethnicity, religion, or sex is the primary objective of Title VII. This

Court then explained how Section 704(a) relates to this primary objective:

> The anti-retaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees.

Id. at 2412.

The *Burlington Northern* Court further declared that Section 704(a) should be construed to provide employees with broad protections:

> Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses. Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances. Interpreting the anti-retaliation provision to provide broad protection from retaliation helps assure the cooperation upon which accomplishment of the Act's primary objective depends.

Id. at 2414 (internal citation omitted).

In light of these broad purposes, this Court rejected the Railway's argument that "adverse action" should be construed narrowly to include only actions that impact the terms and conditions of employment. *Id.* at 2411. Instead, this Court adopted a broad view of what could amount to an "adverse action," recognizing that employers could "effectively retaliate against an employee by taking actions not directly

related to his employment or by causing him harm *outside* the workplace." *Id.* at 2412 (emphasis sic).

Prior to the *Burlington Northern* decision, this Court had occasion to construe the meaning of the term "employee," as used in Section 704(a), and determine whether this term is broad enough to include former employees. *See generally Robinson*, 519 U.S. at 337. The *Robinson* Court ultimately held that the term "employee" indeed includes former employees, reasoning that this broad interpretation of the term is consistent with the purpose of Section 704(a):

> It being more consistent with the broader context of Title VII and the primary purpose of § 704(a), we hold that former employees are included within § 704(a)'s coverage.

Id. at 346 (Thomas, J.). As this Court recognized in *Robinson*, and reiterated in *Burlington Northern*, the purpose of Section 704(a) is to maintain "unfettered access" to Title VII's statutory remedial scheme. *Id.*

This Court has also recognized that Title VII's statutory scheme encourages voluntary compliance by employers. In *E.E.O.C. v. Shell Oil*, this Court explained Congress's intent, stating: "when it originally enacted Title VII, Congress hoped to encourage employers to comply voluntarily with the act." 466 U.S. 54, 77, 104 S.Ct. 1621, 1635 (1984). In addition, in *Occidental Life Insurance Company of California v. E.E.O.C.*, this Court recognized that, in enacting the Equal Employment Opportunity Act of 1972, Congress established an integrated, multi-step enforcement procedure, the goal of which was to foster cooperation and voluntary compliance as the "preferred means for achieving the goal of equality of

equal employment opportunities." *See* 432 U.S. 355, 359; 367-68, 97 S. Ct. 2447 (1977) (internal citation omitted).

Moreover, when Congress amended Title VII in 1991, it explicitly identified private fact-finding as a process to be used in enforcing the Act:

> Where appropriate, and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration is encouraged to resolve disputes arising under the Acts or provisions of federal law amended by this title.

Civil Rights Act of 1991, Pub. L. No. 102-166, § 118, 105 Stat. 1071, 1081 (codified as amended in scattered sections of 42 U.S.C.). Four years after the 1991 amendments, this Court reiterated the "self-monitoring" purpose of Title VII:

> Congress designed the remedial measures in these statutes to serve as a "spur or catalyst" to cause employers "to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges" of discrimination.

McKennon v. Nashville Banner Pub. Co., 513 U.S. 352, 358, 115 S.Ct. 879, 884 (1995) (internal citations omitted).

Despite this Court's clear pronouncements regarding the purposes of Section 704(a) and how the language of this provision should be interpreted, nothing in the Sixth Circuit's opinion indicates that it considered this Court's prior holdings. Rather, in stark contrast to this Court's guidance in the decisions described above, the Sixth Circuit narrowly

construed Section 704(a) with respect to what amounts to "protected activity."

According to the Sixth Circuit, Petitioner Vicky Crawford's conduct was not protected under Section 704(a) when she reported, in detail, repeated instances where the male subject of the employer's investigation made explicit and vulgar sexual comments and gestures toward her, and even grabbed her head in a sexually offensive manner. Finding that Crawford's actions did not amount to protected activity under Section 704(a) is wholly inconsistent with this Court's view of the broad remedial purpose of this provision.

The Sixth Circuit first found that Crawford's actions did not rise to the level of "opposition conduct" under Section 704(a) because, according to the Sixth Circuit's interpretation, Title VII "demands active, consistent opposing activities to warrant protection against retaliation." *Crawford v. Metropolitan Gov't of Nashville & Davidson Cty.*, 211 Fed. Appx. 373, 376 (6th Cir. 2006) (internal citation omitted).

But requiring "overt opposition" in order to qualify for protection under Title VII is contrary to the purpose of Section 704(a), as this Court has previously recognized. Nothing in the statutory language states that opposition conduct must be "active" or "consistent" in order to be protected, and restricting the protections of Section 704(a) to such conduct is wholly at odds with the purpose of providing unfettered access to statutory mechanisms to redress retaliation.[2]

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[2] In fact, in prior cases, the Sixth Circuit itself has recognized that the only limitation on "opposition conduct" was that it must be

The Sixth Circuit's interpretation of the statutory language of Section 704(a) with respect to the term "opposes" is also at odds with prior precedent from this Court relating to statutory construction. Where a literal interpretation of a particular statute would produce a result "demonstrably at odds with the intentions of its drafters," the intention of the drafters, rather than the "strict language," controls. *E.g.*, *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242, 109 S.Ct. 1026, 1031 (1989); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527, 1026 S. Ct. 1981, 1994 (1989) (Scalia, J., concurring).

Here, interpreting the term "opposes" to require "overt" and "ongoing" opposition is demonstrably at odds with the intent of the drafters of Title VII, who, as this Court has recognized, designed the anti-retaliation provisions to provide broad protections for employees who oppose unlawful practices or participate in proceedings designed to enforce Title VII.

After concluding that Crawford did not engage in "opposition" conduct under Section 704(a), the Sixth Circuit also decided that her conduct was not protected under the "participation clause" either. *Crawford*, 211 Fed. Appx. at 376. According to the Sixth Circuit, no protected "participation" can occur until an EEOC charge has been filed. In reaching this conclusion, the Sixth Circuit read into Section 704(a) a limitation that is simply not there, purporting to rely on the statutory language: "We will not alter this limit delineated by the language of Title VII and recognized by this court and others." *Id.* at 377.

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reasonable. *E.g.*, *Johnson v. University of Cincinnati*, 215 F.3d 561, 580 (6th Cir. 2001).

The Sixth Circuit's analysis, however, is contrary to both the Congress's intent and this Court's direction with respect to the manner in which Title VII – and Section 704(a) itself – should be interpreted. Contrary to the *Robinson* Court's mandate, the Sixth Circuit failed to consider whether its conclusion with respect to "participation" in a Title VII "investigation" or "proceeding" fit into a coherent and consistent statutory scheme, and it did not construe Section 704(a) in light of the overarching purpose of Title VII.

Instead, the Sixth Circuit construed the statutory language so narrowly as to create inconsistency with the remedial scheme and purpose of Section 704(a), and with this Court's prior decisions. To rationalize its narrow holding, the Sixth Circuit opined – without any supporting authority – that one of the purposes of Title VII's anti-retaliation provision is to "prevent[...] the burden of Title VII from falling on an employer who proactively chooses to launch an internal investigation." *Crawford*, 211 Fed. Appx. at 377.

The Sixth Circuit's rationale is not consistent with Title VII's statutory scheme or its purpose. Directly contrary to the result reached by the Sixth Circuit, this Court has explained that Section 704(a) prevents employers from taking actions that will deter employees from complaining *to their employers*:

> The anti-retaliation provision seeks to prevent employer interference with "unfettered access" to Title VII's remedial measures. It does so by prohibiting employer actions that are likely "to deter victims of discrimination from complaining to the EEOC," the courts, and their employers.

Burlington Northern, 126 S. Ct. at 2415 (citations omitted).

Nevertheless, the Sixth Circuit endorsed Metro's decision to fire Vicky Crawford after she reported to Metro that she, too, had been sexually harassed, by finding that Crawford did not engage in participation conduct when she reported the harassment to her employer during its internal investigation of another employee's complaint. Indeed, in this case, the burden of Title VII fell on Crawford – not her employer – simply because she responded truthfully to a factual inquiry that was solely under the control of her employer.

As this Court has recognized, while the anti-discrimination provisions of Title VII protect employees for "who they are," the anti-retaliation provisions protect "what they do." *Id.* at 2412. But the Sixth Circuit has added a temporal constraint to protection under Section 704(a), requiring employees to demonstrate not only "what they did," but also "when they did it." And, if their timing is not right, employers will be free to retaliate against their employees for engaging in the very conduct that Congress and this Court have recognized should be protected: participating in investigations and proceedings initiated under Title VII.

Moreover, contrary to the Sixth Circuit's pronouncement, nothing in Title VII's statutory scheme suggests that Congress wanted to ease any burdens of the Act on employers by limiting the conduct protected by the anti-retaliation provisions. The legitimate business interests of employers are protected not by limiting the time when conduct becomes protected under Section 704(a), but by ensuring that only conduct producing real harm is actionable:

> By focusing on the materiality of the challenged action and the perspective of a reasonable person in the plaintiff's position, we believe this standard will screen out trivial conduct while effectively capturing

> those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination.

Burlington Northern, 126 S. Ct. at 2416.

While Congress certainly was concerned about limiting Title VII's burdens, it addressed those concerns by limiting coverage of the Act to employers with 15 or more employees. Now, however, the Sixth Circuit's opinion upsets the balance between employer obligations and employee rights struck by Congress. The Sixth Circuit has turned the employee's anti-retaliation shield into the employer's defense sword by improperly narrowing the field of what can constitute "participation conduct" under Section 704(a).

Contrary to the Sixth Circuit's opinion, Congress intended to include within the scope of the participation clause reasonable employee conduct that occurs during an employer-initiated sexual-harassment investigation. To read Section 704(a)'s reference to "investigation" in a way that excludes an employer's internal investigation is inimical to Congress's desire to make employers and employees active participants in enforcing Title VII.

In fact, in light of Congress's and this Court's recognition of Title VII's goal of voluntary compliance, in addition to its broad remedial scheme, this Court created a Title VII affirmative defense that is predicated upon an employer's conducting – and an employee's *participating in* – an internal investigation responsive to sexual harassment allegations:

> In order to accommodate the agency principles of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII's equally

> basic policies of encouraging forethought by employers and saving action by objecting employees, we adopt the following holding in this case and in *Faragher v. Boca Raton*,...also decided today. An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages. ...The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 764-65, 118 S. Ct. 2257, 2270 (1998). In fact, this Court recognized that "...limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive," and that such reporting "would also serve Title VII's deterrent purpose." *Id.* at 764.

Thus, an employer's internal sexual-harassment investigation must be an investigation that "arises under Title VII" because the investigation's existence and methodology are intrinsic to whether employer liability for the harassment exists under Title VII. Absent the provisions of Title VII prohibiting sexual harassment in the workplace, and the affirmative defense to Title VII liability that this Court created in *Ellerth* and *Faragher*, an employer's investigation of a

complaint would not take on the significance that it does in today's workplace.[3]

In addition, in light of the fact that Title VII's provisions – including Section 704(a) – must be interpreted against the backdrop of the statute's purposes, an employer's investigation of a claim of sexual harassment must, by definition, amount to a Title VII "proceeding." The Sixth Circuit's distinction between investigations that occur before and after an EEOC charge is pending elevates form over substance, undermines the goal of Title VII's anti-retaliation provision, and is therefore inconsistent with this Court's precedent interpreting Title VII.

If the Sixth Circuit's analysis is correct, an employer's retaliatory intent is not the sole, or even the first, concern in determining whether an employee's conduct amounts to "participation" for purposes of Section 704(a). Rather, according to the Sixth Circuit, the technicality of timing is the primary concern. Indeed, if a charge had been pending at the EEOC at the time that Vicky Crawford had participated in her employer's investigation, Vicky Crawford's conduct certainly would have been protected, *even if her employer had no knowledge of the charge being filed with the EEOC.*

Because the Sixth Circuit's myopic interpretation of what may constitute protected activity under Section 704(a) of Title VII is wholly contrary to the purpose of this provision, and of

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[3] Although the Sixth Circuit addressed *Ellerth* investigations, the analysis focused on whether the investigations would remain effective in light of its opinion in *Crawford*. The Sixth Circuit did not address whether the affirmative defense established by *Ellerth* includes participation in those investigations under the protection of Section 704(a).

Title VII in general – as well as with this Court's prior precedent – NELA as *amicus curiae*, respectfully requests that this Court issue a writ of certiorari to settle the important question of federal law presented in this case.

II. This Court has not previously addressed the important issue of what amounts to "protected activity" under Section 704(a), and must do so now in order to ensure that employees will have protection under consistent standards that are workable and predictable for those attempting to enforce and comply with Title VII.

The Sixth Circuit's decision in this case[4] has resulted in an unworkable framework for proving unlawful retaliation under Title VII utilizing indirect evidence. The elements of the *prima facie* case for retaliation are now internally inconsistent: the standards for determining what is "adverse action" are broad under *Burlington Northern*, while the standards for determining what is "protected activity" are narrow under the Sixth Circuit's decision.

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[4] At least three other Circuits have also narrowly construed "protected activity" in a manner similar to the Sixth Circuit in this case. *See, e.g., Brower v. Runyon*, 178 F.3d 1002 (8th Cir. 1999); *E.E.O.C. v. Total Sys. Servs., Inc.*, 221 F.3d 1171 (11th Cir. 1999); *Vasconcelos v. Meese*, 907 F.2d 111 (9th Cir. 1990). In addition, the Sixth Circuit's reported decision in *Abbott v. Crown Motor Company* was the first time the Court held that "Title VII protects an employee's participation in an employer's internal investigation into allegations of unlawful discrimination where that investigation occurs pursuant to a pending EEOC charge." 348 F.3d 537 (6th Cir. 2003) (citing *E.E.O.C. v. Total Sys. Servs., Inc.*, 221 F.3d 1171 (11th Cir. 2000)).

This internal inconsistency essentially eviscerates the holding of *Burlington Northern* because, from a practical standpoint, an aggrieved employee will never reach the "adverse action" prong of the *prima facie* test. If the categories of protected conduct are now so narrow as to exclude anything but "overt" and "continuing" opposition, or participation only with a pending EEOC charge, then it will not matter whether the employer's actions against the employee are "adverse" under *Burlington Northern*. This result is untenable not only in light of the purposes of Title VII and Section 704(a), but also in light of the deleterious effects it will have on employer-employee relations, as well as on both EEOC and private enforcement of Title VII.

By permitting retaliation against employees who reasonably provide information to their employers' investigators, and who corroborate allegations of sexual harassment, the Sixth Circuit's opinion undermines any effort to establish anti-harassment policies in the workplace. The EEOC has informed employers that anti-harassment policies are ineffective without assurances to employees that participation will not result in retaliation:

> An employer should make clear that it will not tolerate adverse treatment of employees because they report harassment or provide information related to such complaints. An anti-harassment policy and complaint procedure will not be effective without such an assurance.

Equal Employment Opportunity Commission, *Enforcement Guidance: Vicarious Employer Liability For Unlawful Harassment By Supervisors*, *available at* http://www.eeoc.gov /policy/docs/harassment.html

As a result of the Sixth Circuit's opinion, however, any such assurances from employers will be, at best, ineffective, and at worst, disingenuous. Employers and employees will know that the law permits retaliation against employees who respond honestly to their employers' questions during an internal investigation of unlawful discriminatory, or harassing, conduct. The practical effect is that employees will refrain from providing information to their employers regarding Title VII liability, out of fear of retaliation for doing so.

Responsible employees and employers, alike, want to eliminate sexual harassment from the workplace. Effective anti-harassment policies serve this objective. The Sixth Circuit's opinion, however, will make it nearly impossible for employers to investigate harassment complaints in a legitimate and meaningful manner.

Without protection against retaliation, witnesses to harassment are unlikely to risk their jobs by providing truthful information about the alleged harasser. In turn, without corroborating witnesses, employers' efforts to identify sexual harassment promptly, respond to a complaint adequately, and thus eliminate such harassment from the workplace, will be significantly diminished, and Congress's goal of making employers an effective part of Title VII enforcement will be thwarted.

The lack of corroborating witnesses will also make it difficult for employers to comply with this Court's directives in *Ellerth* and *Faragher*: that they must exercise reasonable care to prevent and correct any sexually harassing behavior. If employers are unable to obtain truthful information about sexual harassment occurring in the workplace, they will be unable to prevent or correct the behavior.

The Sixth Circuit's opinion is also likely to result in an influx of "preemptive" EEOC charges by harassment victims and witnesses. Attorneys representing harassment victims will know that they must advise their clients not only to report the harassment to the employer, but also to report it immediately to the EEOC. Under the Sixth Circuit's decision, the only way that a victim of sexual harassment can obtain cooperation from corroborating witnesses is to file an EEOC charge.[5] This is because an EEOC charge is the only way to assure corroborating witnesses that they can tell their employers the truth during an internal investigation without fear of retaliation.

Moreover, when attorneys representing harassment victims attempt to conduct their own investigations of the allegations of harassment, they will have to advise any witnesses that they should cooperate with any investigation by the employer, but that they should first file an EEOC charge in order to protect themselves against retaliation for having so cooperated. Then, because the victims' claims will unlikely meet the standards set forth by this Court in *Ellerth* and *Faragher*, many of these charges will simply be dismissed.

While the law allows a charge to be filed by any person on behalf of a victim of harassment, certainly the law was not enacted to protect against a timing technicality problem. Again, Congress's objective was to minimize the need to resort to the EEOC and the courts. In contrast, the Sixth

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[5] In light of the Sixth Circuit's decision, the absence of a pending EEOC charge will create a Hobson's choice for employees who are witnesses: either provide truthful information in response to their employer's inquiry, or refuse to cooperate in the employer's investigation, at the risk of discipline or termination for insubordination.

Circuit's opinion drives victims and witnesses directly to the EEOC and the courts, in an effort to ensure that they will not suffer adverse employment action for providing their employers with truthful information in response to an internal sexual-harassment investigation.

Accordingly, for all of the foregoing reasons, NELA, as *amicus curiae*, respectfully requests that a writ certiorari issue to allow this Court to hear the case, and restore the appropriate balance to the elements of a *prima facie* case of unlawful retaliation under Section 704(a) of Title VII.

CONCLUSION

For all of the above reasons, the National Employment Lawyers Association as *Amicus Curiae*, respectfully requests that this Honorable Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

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No. 06-1595

IN THE SUPREME COURT OF THE UNITED STATES

VICKY S. CRAWFORD,

Petitioner,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* THE TENNESSEE EDUCATION ASSOCIATION AND THE METROPOLITAN NASHVILLE EDUCATION ASSOCIATION IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

The Tennessee Education Association ("TEA") and the Metropolitan Nashville Education Association ("MNEA") submit this brief as *Amici Curiae* in support of the Petitioner Vicky S. Crawford.[1] The TEA is a voluntary membership association and is Tennessee's largest professional organization. The TEA is the Tennessee state affiliate of the National Education Association ("NEA"). The TEA's members include elementary and secondary teachers, school administrators, educational and support personnel, higher education faculty, and students preparing to become teachers in the public school setting. Over sixty percent of the 72,000 teachers currently licensed to teach in the public schools of Tennessee are members of the TEA. In addition, there are more than 2,200 non-licensed educational support members in the TEA. Among the pertinent purposes and goals of the TEA are the defense of the civil and professional rights of educators and the securing and enforcement of fair and equitable employment procedures for educators.

The MNEA is a local affiliate of the TEA. The MNEA's members include licensed educators employed in the public schools throughout the Metropolitan Nashville Public Schools. Specifically, MNEA's members include elementary and secondary teachers, school administrators, educational and support personnel, higher education faculty, and students preparing to become teachers in the public school setting. More than 3,000 licensed teachers in the

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[1] The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to this Court's Rule 37.6, *Amici* states that none of the parties or its counsel wrote the brief in whole or in part and that no one other than *Amici* and their counsel made any monetary contribution to the preparation or submission of the brief.

Metropolitan Nashville Public Schools are members of the MNEA. In addition, as the recognized professional employees' organization for professional employees in the school system, the MNEA represents the interests of all 5,600 licensed educators in the Metropolitan Nashville Public Schools, including non-members, for purposes of collective bargaining negotiations under state law.[2] The MNEA therefore negotiates employment rights and compensation for all school system educators, represents educators in employment related matters, and insures that educators' rights are protected in personnel matters. The MNEA's mission is to promote excellence in the school system, seek community support for public education, secure economic and professional security for educators, maintain a strong united teaching organization, advance human and civil rights in education, and empower teachers.

Based on the functions and missions of the TEA and the MNEA, they are interested in this precedent setting litigation which affects the rights of the professional employees that they represent. This case implicates the employment interests of teachers and others who may be called upon to testify or provide information in internal investigations of discrimination and harassment. Protecting teachers and others who participate in such internal investigations conducted by management is germane and central to the associational purposes of the TEA and the MNEA.

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[2] Tennessee is a "right to work" State, so that membership in the MNEA is not required, and the MNEA has no authority to require payment of an agency fee by non-members. The MNEA nonetheless is the recognized representative of all professional employees in the Metropolitan Nashville Public Schools pursuant to the Education Professional Negotiations Act, *Tenn. Code Ann. §§ 49-5-601 et seq.*

SUMMARY OF ARGUMENT

When an employee discloses information to her employer about sexual harassment by a supervisor, she is opposing a practice made unlawful by Title VII of the Civil Rights Act of 1964. She is protected from retaliation by her employer for opposing that unlawful practice. 42 U.S.C. § 2000e-3(a) makes it an unlawful employment practice to retaliate against an employee "because [s]he has opposed any practice, made an unlawful employment practice by this subchapter." The plain language of the "opposition clause" in the anti-retaliation provision of Title VII does not depend on any particular quantity of opposition, nor does it require that the opposition occur in any particular setting.

The decision of the Sixth Circuit, on the other hand, denies protection from retaliation to an employee whose opposition to unlawful practices occurs in the context of an employer investigation into those practices. The Sixth Circuit's holding that an employee's cooperation with an employer's internal investigation was not opposition under the meaning of Title VII's opposition clause will have detrimental effects on the rights and interests of educators, and others, called on to answer questions or provide information in sexual harassment investigations and other internal investigations into allegations of discriminatory conduct.

Only by reading into the "opposition clause" a condition on the type of opposition that Congress did not place there has the Sixth Circuit reached this result. This decision by the Sixth Circuit will discourage employees from answering questions truthfully in employer investigations of sexual harassment and other discriminatory conduct. This

decision will undermine internal investigations and informal resolution of workplace discrimination issues. In the hands of an unscrupulous employer, this decision will convert the affirmative defense in *Faragher* from shield to sword. *Faragher v. City of Boca Raton, 524 U.S. 775 (1998).* Just as occurred here, an employer investigating one employee's allegation of supervisor harassment will be encouraged by the Sixth Circuit's decision to use its investigation to root out other potential claimants and discharge them before they repeat their claims in some other forum.

The Sixth Circuit's decision therefore is not only at odds with the plain language of the "opposition clause" but in fact turns that clause on its head. The Sixth Circuit's decision creates a safe-haven of retaliatory conduct that is unprotected by the broad language of the opposition clause.

ARGUMENT

A. The Sixth Circuit wrongly concluded that opposition to an unlawful employment practice is protected only if that opposition is actively initiated by the employee and not if it takes the form of testimony or disclosures in response to employer inquiries.

Section 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-3(a), prohibits employers from retaliating against individuals who oppose practices that are unlawful under Title VII or who participate in Title VII proceedings:

> "It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed

> any practice, made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

The pertinent words, "*because he has opposed* any practice, made an unlawful employment practice by this subchapter," are deliberately broad. The EEOC in its Compliance Manual declares that complaining to anyone about alleged discrimination against oneself or others is an example of covered opposition conduct. *EEOC Compliance Manual, Section 8-II(B)(2).* An individual's internal complaint to a supervisor has been held to "surely" constitute protected opposition. *Kotcher v. Rosa & Sullivan Appliance Ctr., 957 F.2d 59, 65 (2nd Cir. 1992); see also, Ray v. Henderson, 217 F.3d 1234, 1240 (9th Cir. 2000); Lambert v. Genesee Hospital, 10 F.3d 46, 55 (2nd Cir. 1993), cert. denied, 511 U.S. 1052 (1994).*

This broad protection for opposition is balanced by the requirement that the opposition be reasonable. *Clark County School District v. Breeden, 532 U.S. 268, 271 (2001).* The activity by which opposition is expressed must also be reasonable. Consequently, bad faith accusations, opposition conduct that so interferes with the performance of the job as to render the employee ineffective, and opposition that unreasonably disrupts the work place, are not protected.[3] The participation clause's protections thus have generally been regarded as more expansive and broader than those of the opposition clause. *See, e.g., Slagle v. County of Clarion,*

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[3] The EEOC declares that the manner of opposition must be "reasonable" to balance the right of opposition and the public's interest with the employer's need for a stable and productive workplace. *EEOC Compliance Manual, Section 8-II(B)(3)(a).*

435 F.3d 262, 266 (3rd Cir. 2006); Deravin v. Kerik, 335 F.3d 195, 2003 (2nd Cir. 2003); Booker v. Brown & Williamson Tobacco Co., 879 F.2d 1304, 1312 (6th Cir. 1989).

But in this case, the Sixth Circuit did not base its decision on any conclusion about the reasonableness of Crawford's beliefs or the reasonableness of her manner of opposition. Instead, the Sixth Circuit apparently concluded that while a complaint made to a supervisor that is employee-initiated is protected opposition activity, a complaint made to a supervisor in response to the supervisor's inquiry is not.

According to the Sixth Circuit's opinion, Crawford worked for the Metropolitan school system for thirty years until she was fired.[4] Crawford was called in to meet with school system officials in connection with an investigation of sexually inappropriate behavior by Dr. Gene Hughes. Hughes was the school system's employee relations director. In response to questioning in the course of the investigation of Hughes' behavior, Crawford told the investigators that Hughes had sexually harassed her and other employees. She provided a detailed and vivid description of several examples of Hughes' harassment. Crawford was one of three employees who accused Hughes of sexually inappropriate conduct during the course of this investigation. After the investigation, Hughes was not disciplined, but all three of the employees who accused him of improprieties were immediately investigated themselves on other grounds, and all were promptly discharged.

The Sixth Circuit considered claims by Crawford that she was terminated in violation of both the "opposition" and

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[4] The Sixth Circuit, considering an appeal from a grant of summary judgment, viewed the facts in the light most favorable to Crawford.

"participation" clauses of Section 704(a). The Sixth Circuit rejected Crawford's opposition clause claim as follows:

> "First, Crawford's actions do not constitute opposition under the meaning of the opposition clause. We have enumerated the types of activities that constitute opposition under Title VII: 'complaining to anyone (management, unions, other employees, or newspapers) about allegedly unlawful practices; refusing to obey an order because the worker thinks it is unlawful under Title VII; and opposing unlawful acts by persons other than the employer – e.g., former employers, union, and co-workers.' *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 579 (6th Cir. 2000). The general idea is that Title VII 'demands active, consistent "opposing" activities to warrant ... protection against retaliation.' *Bell v. Safety Grooving and Grinding, LP*, 107 F. App'x. 607, 610 (6th Cir. 2004).
>
> "Crawford's actions consisted of cooperating with Metro's investigation into Hughes by appearing for questioning at the request of Frazier and, in response to Frazier's questions, relating unfavorable information about Hughes. Crawford does not claim to have instigated or initiated any complaint prior to her participation in the investigation, nor did she take any further action following the investigation and prior to her firing. This is not the kind of overt opposition that we have held is required for protection under Title VII."

By pointing out that Crawford does not claim to have made complaints prior to the investigation and took no further action following the investigation,[5] the Sixth Circuit's decision seems to be based to some extent on the quantity of opposition conduct by Crawford. However, even the Respondent Metro acknowledged in its Response to Crawford's Petition for Rehearing in the Sixth Circuit that the quantity of opposition conduct is not a basis for denying an employee the protection of Title VII's opposition clause. (Metro Response to Petition for Rehearing, p. 4). Nothing in the text of the opposition clause, the EEOC's Compliance Manual, or the decisions interpreting the clause suggests that some particular quantity of opposition activity is necessary for the protection to apply.

The only remaining explanation for the Sixth Circuit's decision is the notion that Crawford's opposition in an internal investigation is not protected because it was not "active" or "consistent." The Sixth Circuit emphasized that Crawford did not "instigate or initiate" a complaint prior to cooperating in the internal investigation. Apparently, the Sixth Circuit concluded that while Crawford's claims of harassment would be protected opposition activity if she volunteered or otherwise initiated the disclosure of those claims, they were not protected here because they were disclosed in response to questions by her employer.[6]

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[5] Crawford made her complaints in the investigation to the individuals charged with the responsibility of investigating and addressing those complaints on behalf of her employer. The Panel decision does not suggest what other sort of action Crawford should have taken following the investigation.

[6] In addition to applying an "active initiation" requirement that is not found in the text of the opposition clause, the Sixth Circuit also ignored a critical fact that should limit the application of an "active initiation" requirement should this Court adopt that requirement -- the individual

Certainly Ms. Crawford's detailed account of the sexual harassment she experienced at the hands of Hughes, shared in an investigative proceeding, satisfied the reasonableness requirement discussed by this Court in *Breeden*. It was reasonable for Ms. Crawford to participate in the internal investigation launched by her employer. It was reasonable for Ms. Crawford to respond to questions posed by her employer in an honest and truthful manner. It was also reasonable that Ms. Crawford thought she was protected by Title VII's anti-retaliation provisions when she spoke as a witness in an internal sexual harassment investigation launched by her employer.

Ms. Crawford had an obligation, as an employee, to answer her employer's questions in an honest and truthful manner. There is simply no reason why the opposition clause should provide less protection to her than it would to someone who made the same complaints not because there was an investigation but because of some contractual duty or other sense of obligation or motivation. In either case the level of "active initiation" is no different. And in either case, there is no statutory basis for the imposition of an "active initiation" requirement superimposed on the opposition clause.[7]

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who was engaging in the harassing conduct, Mr. Hughes, was the employee relations director, the person to whom an actively initiated complaint of harassment ordinarily would be directed.

[7] Because the Sixth Circuit's "active initiation" requirement finds no support in the language of the opposition clause or in the EEOC guidance, it is difficult to discern how that requirement might be interpreted in other contexts. For example, complaints to co-employees have in some instances been held to constitute opposition activity. Is it a defense that the co-employee initiated the discussion? Where the activity involves signing a letter or petition, is it a defense that the employee's signature was requested by someone else? The Sixth Circuit's "active initiation" requirement could spawn a factual dispute in virtually any

Under the Sixth Circuit's decision, if two employees offered precisely the same sort of information in the internal investigation, but one was summoned to provide information while the other volunteered to provide it, they would be treated entirely differently under the opposition clause. The one who volunteered to provide information might be protected because of her "active initiation" of opposition, while the one who was summoned would be unprotected. This irrational distinction finds no basis in the text of the opposition clause.

B. The Sixth Circuit's decision undermines the purpose of Title VII's anti-retaliation provisions.

The purpose behind Section 704(a) is to prevent employers from taking actions that will deter employees from complaining to their employer:

> "The anti-retaliation provision seeks to prevent employer interference with unfettered access to Title VII's remedial measures. It does so by prohibiting employer actions that are likely to 'deter victims of discrimination from complaining to the EEOC,' the courts, and their employers." *Burlington Northern & Santa Fe Railway Co. v. White, 126 S.Ct. 2405, 2415 (2006).*

The Sixth Circuit's decision to allow Ms. Crawford to be terminated for her cooperation in an internal investigation regarding the sexual harassment of Hughes is

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opposition clause case over whether the opposition activity was initiated by the plaintiff or flowed as a consequence of activity initiated by someone else, with the latter presumably beyond the protection of Title VII.

directly contrary to this purpose. This Court has acknowledged that Section 704(a) should be interpreted to provide broad protection:

> "Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and *act as witnesses.* 'Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances.' Interpreting the anti-retaliation provision to provide broad protection from retaliation helps assure the cooperation upon which accomplishment of the Act's primary objective depends." *Id. at 2414 (internal citation omitted) (emphasis added).*

The Sixth Circuit's requirement that an employee actively initiate a complaint, rather than making a complaint in response to an inquiry or investigation, does not interpret the anti-retaliation provision to provide broad protection. Rather, it narrows the protection afforded under Title VII and discourages "cooperation of employees who are willing...to act as witnesses...."

C. The Sixth Circuit's decision establishes a dangerous precedent that threatens employees who cooperate in internal investigations of discrimination and undermines employer efforts to informally resolve discrimination claims.

The Sixth Circuit's decision is particularly pernicious in the context in which this very case arises, supervisor sexual harassment. Where there is no tangible employment action taken, an employer defending a claim of sexual harassment by a supervisor may raise an affirmative defense

to liability or damages by proving (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. *Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Industries v. Ellerth, 524 U.S. 742 (1998).* The availability of this affirmative defense encourages employers to create internal mechanisms for receiving, investigating, and resolving complaints of sexual harassment. Those internal mechanisms, in turn, encourage early and informal resolutions of harassment claims. Such early and informal resolutions reduce the burden on the EEOC and further the purposes of Title VII.

The Sixth Circuit's decision will turn these salutary benefits on their heads. The affirmative defense of *Faragher* and *Ellerth* was meant to be a shield for employers who act reasonably and promptly to eliminate discriminatory conduct by supervisors. It was not meant to be a sword with which employers could safely rid themselves of victims of discrimination without liability. Yet, such an iniquitous result is the product of the Sixth Circuit's decision. The employer who fires a witness will insist that it is protected under *Faragher* and *Ellerth* because that witness was fired before she actually initiated her own complaint under the employer's internal procedure. Meanwhile, the employer will be protected under the Sixth Circuit's decision here from a claim of retaliation. Only the individual whose complaint is being investigated will enjoy the protection of the opposition clause.

Of course, not all employers will misuse the internal investigations described in *Faragher* and *Ellerth* in this way. But the occurrences here, the discharges of three

complaining witnesses while no action was taken against the offending supervisor, reveal the reality that this sort of misuse of the internal investigation process will occur, and the Sixth Circuit has sanctioned it. Meanwhile, for other well-motivated employers, the real value of internal investigations in uncovering and correcting discriminatory behavior by supervisors will be diminished. A witness who is not the complaining party will be discouraged from revealing other instances of harassment in an investigation, for fear that the revelation could lead to a retaliatory discharge without any protection under the opposition clause. The internal mechanism for investigating harassment complaints will be less valuable and less useful because of other employees' unwillingness to be candid. As a consequence, there will be fewer informal resolutions of harassment claims. An employer will find it far more difficult to interview potential witnesses when investigating discriminatory practices. Sensitive information will be much less forthcoming if employees fear that cooperating in an internal investigation by an unscrupulous employer could jeopardize their livelihood, without recourse. An important key to effective enforcement of Title VII will be diminished or, in some cases, lost. *Burlington Northern & Santa Fe Railway Co. v. White, 126 S.Ct. at 2414.*

The EEOC has informed employers that anti-harassment policies are ineffective without assurances to employees that participation will not result in retaliation:

> "An employer should make clear that it will not tolerate adverse treatment of employees because they report harassment *or provide information related to such complaints.* An anti-harassment policy and complaint procedure will not be effective without such an assurance." *EEOC Enforcement Guidance:*

Vicarious Employer Liability for Unlawful Harassment By Supervisors (http//www.eeoc.gov/policy/docs/harassment.html).

The prospect of permissible employer retaliation against witnesses in an internal investigation thus begs another question. The Sixth Circuit's decision, if left undisturbed, will produce precisely the result that the EEOC warns against in this guidance – it will leave the employer's assurances unreliable and will consequently render the employer's anti-harassment policy and complaint procedure ineffective. If the employer's anti-harassment policy and complaint procedure is therefore ineffective, will it satisfy the requirements of *Faragher* and *Ellerth*. Perhaps not, but even that failing will subject the employer only to liability on the claim under investigation. As to witnesses like Crawford who offer corroborating evidence in the investigation, the Sixth Circuit's decision creates a safe haven for employers to engage in retaliation.

The Sixth Circuit's decision does not further the Congressional policy in the opposition clause, is inconsistent with the plain meaning of the opposition clause, and undermines internal investigations of harassment claims and the benefits to both employees and employers that flow from those investigations. It is contrary to the opposition clause as it is written and as it has been interpreted by the EEOC and by this Court.

CONCLUSION

The TEA and the MNEA as *Amici Curiae* respectfully submit that the Sixth Circuit's decision should be reversed.

Respectfully submitted,

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On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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Petition for Certiorari Filed May 30, 2007
Petition for Certiorari Granted January 18, 2008

241 B 110

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The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Certiorari:

Appendix A - Order of the United States Court of Appeals for the Sixth Circuit Denying Rehearing, March 1, 2007 ..... 1a

Appendix B - Opinion of the United States Court of Appeals for the Sixth Circuit, November 14, 2006 ..... 3a

Appendix C - Order and Memorandum Opinion of the United States District Court for the Middle District of Tennessee, January 6, 2005 ..... 11a

The following has been omitted in printing this joint appendix because it appears on the following pages in the appendix to the Brief in Opposition:

Fact Finding Report 8-17

RELEVANT DOCKET ENTRIES

U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT

05-5258

12/22/2006 LETTER SENT by blh to Francis H. Young for Appellee Metro Govt notifying that he is directed to respond to a petition for en banc rehearing [3494175-1] filed by Ann Buntin Steiner. Response due by 1/10/07. [05-5258].

01/10/2007 RESPONSE to a petition for en banc rehearing [3494175-1] filed by Ann Buntin Steiner. Response filed by Francis H. Young for Appellee Metro Govt. Certificate of service date 1/9/07. [05-5258]

02/08/2007 MOTION filed for leave to file a statement in support of appellant's petition for rehearing en banc. Motion filed by Gregory A. Gordillo for Natl Employ Lawyers. Certificate of service date 2/7/07. [05-5258]

02/08/2007 TENDERED : statement in support of appellant's petition for rehearing en banc from Gregory A. Gordillo for Natl Employ Lawyers [05-5258]

03/01/2007 ORDER filed granting motion for leave to file a statement as amicus curiae in

support of appellant's petition for rehearing en banc [3532855-1] filed by Gregory A. Gordillo [05-5258]. Entered by order of the court.

03/01/2007 MEMORANDUM IN SUPPORT of appellant's petition for rehearing en banc. Filed by Gregory A. Gordillo for Amicus Curiae Natl Employ Lawyers. Certificate of service date 2/7/07. [05-5258]

03/01/2007 ORDER filed denying petition for en banc rehearing [3494175-1] filed by Ann Buntin Steiner [05-5258]. Danny J. Boggs, Martha C. Daughtrey, Circuit Judges; Richard Mills, District Judge.

03/15/2007 MANDATE ISSUED with no cost taxed [05-5258]

06/07/2007 U.S. Supreme Court notice filed regarding petition for writ of certiorari filed by Appellant Vicky S. Crawford. Filed in the Supreme Court on 05-30-07, Supreme Ct. case number: 06-1595. [05-5258]

01/22/2008 U.S. Supreme Court letter filed granting petition certiorari petition [3599401-2] filed by Vicky S. Crawford. Supreme Court Action 1 Disposition Date: 01/08/2008, Supreme Court Case Number: 06-1595.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
(NASHVILLE)

CASE # 3:03-cv-00996

Date	Docket #	Description
10/24/2003	1	COMPLAINT (Summons(es) issued) Filing fee paid in the amount of: 150.00 Receipt # 95011 (w/attachment) (ot) (Entered: 10/28/2003)
11/06/2003	8	AMENDED COMPLAINT [1-1] by pltf; jury demand (gi) (Entered: 11/07/2003)
11/18/2003	9	ANSWER by defts Metropolitan Gov and Pedro Garcia to [1-1] and [8-1]; jury demand (km) (Entered: 11/18/2003)
11/26/2003	10	MOTION by deft Gene Hughes to dismiss (km) (Entered: 12/01/2003)
11/26/2003	11	MEMORANDUM by deft Gene Hughes in support of motion to dismiss [10-1] (km) (Entered: 12/01/2003)
12/23/2003	12	ORDER by Judge Todd J. Campbell: Deft Hughes' motion to dismiss [10-1] is

		granted, & all claims against Dr. Gene Hughes are dismissed. EOD 12/23/03 (cc: all counsel) (dlt) (Entered: 12/23/2003)
12/29/2003	13	MOTION by defts for partial dismissal (w/attached exhibits A-C) (gi) (Entered: 12/30/2003)
12/29/2003	14	MEMORANDUM by defts in support of motion for partial dismissal [13-1] (w/attachment) (gi) (Entered: 12/30/2003)
01/09/2004		PROPOSED Initial Case Management Order (km) (Entered: 01/12/2004)
01/12/2004	15	MOTION by pltf Vicky S. Crawford to reconsider deft's motion to dismiss Gene Hughes as a party deft (w/attached exhibits 1-4) (km) (Entered: 01/13/2004)
01/15/2004	18	RESPONSE by deft Gene Hughes to motion to reconsider deft's motion to dismiss Gene Hughes as a party deft [15-1] (km) (Entered: 01/15/2004)
01/16/2004	19	RESPONSE by pltf Vicky S. Crawford to motion for partial

		dismissal [13-1] (w/attached exhibits 1-6) (km) (Entered: 01/20/2004)
01/23/2004	20	REPLY by defts Metropolitan Gov and Pedro Garcia to response to motion for partial dismissal [13-1] (km) (Entered: 01/26/2004)
04/06/2004	23	MEMORANDUM OF THE COURT: (EOD 4/6/04) (cc: all counsel) (km) (Entered: 04/06/2004)
04/06/2004	24	ORDER by Judge Todd J. Campbell: For the reasons stated in the accompanying Memorandum, defts' motion for partial dismissal [13-1] is granted and pltf's motion to reconsider [15-1] is denied. Pltf claims against deft Garcia and Pltf's sexual harassment claims are dismissed. The remaining claims are pltf's Title VII and THRA retaliation claim against Metro and pltf's Whistleblower Act claim against Metro. terminating party Pedro Garcia. (EOD 4/6/04) (cc: all counsel) (km) (Entered: 04/06/2004)

11/29/2004	51	MOTION by deft Metropolitan Gov for summary judgment (w/attachments) (km) (Entered: 11/30/2004)
11/29/2004	52	MEMORANDUM by deft in support of motion for summary judgment [51-1] (w/attachment) (km) (Entered: 11/30/2004)
11/29/2004	53	STATEMENT of material facts not in dispute by deft in support of [51-1] (km) (Entered: 11/30/2004)
11/29/2004	54	NOTICE by deft Metropolitan Gov of filing exhibits in support of deft's motion for summary judgment (w/attached Volume 1 (A-I) and Volume 2 (J-S) (km) (Entered: 11/30/2004)
11/29/2004	55	AFFIDAVIT of Kimberly N. McDoniel re [51-1] (km) (Entered: 11/30/2004)
12/22/2004	58	BRIEF IN RESPONSE by pltf to motion for summary judgment [51-1] (w/attached exhibits 1-29) (km) (Entered: 12/23/2004)

12/22/2004	59	AFFIDAVIT of Donna Elaine Rice re [58-1] (km) (Entered: 12/23/2004)
12/22/2004	60	AFFIDAVIT of Tammy Daniels re [58-1] (km) (Entered: 12/23/2004)
12/22/2004	61	RESPONSE by pltf to deft's stmt [53-1] (km) (Entered: 12/23/2004)
12/22/2004	62	STATEMENT of additional material facts by pltf in support of [58-1] (km) (Entered: 12/23/2004)
01/03/2004	64	NOTICE by deft of filing additional exhibit in support of deft's motion for summary judgment (w/attached exhibit T) (km) (Entered: 01/04/2005)
01/03/2004	65	ORDER by Judge Todd J. Campbell granting motion for an extension of time until 1/10/05 in which to file a reply [63-1]. (EOD 1/4/05) (cc: all counsel) (km) (Entered: 01/04/2005)
01/05/2005	66	MEMORANDUM OF THE COURT: (EOD 1/6/05) (cc: all counsel) (km) (Entered: 01/06/2005)

01/05/2005	67	ORDER by Judge Todd J. Campbell: For the reasons stated in the accompanying memorandum, deft's motion for summary judgment [51-1] is granted and this action is dismissed; terminating case. , Jury trial set for 5/3/05 and pretrial conference set for 4/25/05 are canceled. (EOD 1/6/05) (cc: all counsel) (km) (Entered: 01/06/2005)
01/14/2005	68	NOTICE by pltf of filing the affidavit of Vicky S. Crawford (km) (Entered: 01/14/2005)
01/14/2005	69	AFFIDAVIT of Vicky S. Crawford re [68-1] (km) (Entered: 01/14/2005)
01/26/2005	70	NOTICE OF APPEAL by pltf Vicky S. Crawford from Dist. Court decision [67-3] (mk) (Entered: 01/27/2005)
11/16/2006	85	INFORMATION COPY from 6CCA as to Notice of Appeal [70] that the district court's grant of summary judgment is affirmed. (km,) (Entered: 11/17/2006)
03/20/2007	86	MANDATE of USCA as to [70] Notice of Appeal filed by Vicky S. Crawford, that the district

		court's decision is affirmed. (km,) (Entered: 03/20/2007)
06/14/2007	87	NOTICE from US Supreme Court that the petition for a writ of certiorari was filed on 5/30/07 and placed on the docket 6/1/07 as No. 06-1595. (km,) (Entered: 06/14/2007)
01/28/2008	88	NOTICE from US Supreme Court that the petition for a writ of certiorari is granted. The brief of petitioner is to be filed on or before 2/25/08. The brief of the respondent is to be filed on or before 3/24/08. A reply brief, if any, is to be filed in accordance with Rule 25.3 of the Rules of this Court. (km) (Entered: 01/28/2008)

IN THE UNITED STATES DISTRICT COURT
FOR TENNESSEE
FOR THE MIDDLE DISTRICT
NASHVILLE DIVISION

No. 3:03-0996

[Dated December 21, 2004]

VICKY S. CRAWFORD,	)
	)
Plaintiff,	)
	)
v.	)
	)
THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, DR. GENE HUGHES AND DR. PEDRO GARCIA	)
	)
Defendants.	)

STATE OF TENNESSEE)

COUNTY OF DAVIDSON)

AFFIDAVIT OF VICKY S. CRAWFORD

I, Vicky S. Crawford, after being duly sworn in accordance with law do hereby swear and affirm that the foregoing information is true and accurate to the best of my personal knowledge, information and belief.

1. I am Vicky S. Crawford. I was employed by The Metropolitan Government of Nashville and Davidson County, Tennessee for over 30 years. I started out as a receptionist in food services. I was promoted to Payroll Clerk in approximately 1975 and held this position for three years. Then I was promoted to Payroll Coordinator. This was my position when I was fired. I always received good evaluations through out the course of my employment with Metro.

* * *

3. In the Fall of 2001, the Metropolitan School Board (hereinafter the Board) hired Dr. Pedro Garcia (hereinafter Garcia) to be the new Director of Schools. During Garcia's administration, Dr. Pedro Garcia brought in as part of his administration Gene Hughes and appointed him the Director of Employee Relations for The Metropolitan Nashville Public School System.

4. In approximately May of 2002, Jennifer Bozeman, an attorney for The Metropolitan Legal Department, contacted the Human Resources Department about a potential sexual harassment complaint with regard to Gene Hughes, the Director of Employee Relations for The Metropolitan Nashville Public School System.

5. Because Gene Hughes was responsible for EEOC investigations, including complaints of sexual harassment, this sexual harassment complaint with regard to Gene Hughes was brought to the attention of Dr. Pedro Garcia.

6. In the course of this investigation, the officials at Metro contacted me about Gene Hughes and I was told by Veronica Frazier that she was conducting a sexual harassment investigation and needed to speak with me. On July 22, 2002, I showed up at the legal department for Metro as requested and Veronica Frazier and Kim Barwise questioned me about whether or not I had any information with regard to inappropriate physical conduct or inappropriate behavior on behalf of Gene Hughes.

7. I knew immediately that he was the one being investigated for sexual harassment. I told the investigators that Gene Hughes sexually harassed myself and other employees. I informed them that he had asked to see "my titties" on numerous occasions. I would state Hey Dr. Hughes what's up and he would grab his crotch and state "You know what's up". He would approach my window and put his crotch up to the window and asked to see my titties all at the same time. I told him "No, Dr Garcia wouldn't like that" and he told me "You don't know he just might". One time Gene Hughes came in my office and I asked him what I could do for him and he grabbed my head and pulled it to his crotch. I pushed him away and told him to get the hell out of my office. I told Tamera Sadler and Dianne Proffitt of these actions. I believed that I was exercising my rights under Federal law when I informed Veronica Frazier of this. I informed both Veronica Frazier and Kim Barwise that Gene Hughes had sexually harassed me and other employees. When I made these statements to Veronica Frazier and Kim Barwise, I was opposing the illegal actions of Gene Hughes.

8. It is my understanding that other witnesses informed Metro of other inappropriate words and conduct by Gene Hughes.

9. Upon completing the investigation Metro did conclude that Gene Hughes did participate in inappropriate and unprofessional behavior.

10. On September 13, 2002, Veronica Frazier and Delaine Barwise sent a fact finding report to Pedro Garcia. In the fact finding report it was noted that more than one witness referenced their perception of Mr. Hughes' arrogance and penchant for grabbing his crotch.

11. It was also determined that two of the witnesses were "especially fearful about loss of their job. The witness's apprehension about participating in this investigation was greater than fact finders would reasonably expect." I was identified on the first page of the report as being one of nine employees interviewed. This list of nine included Gene Hughes.

12. After fully cooperating with The Metropolitan Government's investigation of Gene Hughes, on November 6, 2002, I was placed on administrative leave from my job with Metro stating that Metro was investigating whether or not I had embezzled money from the district. I had not embezzled any money from the district.

* * *

18. On December 12, 2002, an appeals hearing was held with regard to my termination. In that

hearing my counsel told Chris Hensen that I testified against Dr. Hughes in terms of sexual harassment. My attorney told Chris Hensen that Metro rather than firing Gene Hughes walked in and fired the four women who complained about Gene Hughes. Chris Hensen was told that the charges against me were trumped up by whomever in retaliation. Additionally, Chris Hensen was provided a copy of the sexual harassment investigation fact finding report.

At this hearing, I did not have access to any of the computer files or the "void and see" files nor any of the paperwork which would have allowed me to clearly testify to Metro as to the status of the checks which Metro claims I failed to process.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR TENNESSEE
FOR THE MIDDLE DISTRICT
NASHVILLE DIVISION

CASE NO. 3:03-0996

[Dated July 1, 2004]

VICKY S. CRAWFORD	)
	)
Plaintiff,	)
	)
vs.	)
	)
THE METROPOLITAN GOVERNMENT OF NASHVILLE and DAVIDSON COUNTY, TENNESSEE, DR. GENE HUGHES and DR. PEDRO GARCIA,	)
	)
Defendants.	)

Deposition of :
VICKY S. CRAWFORD
July 1, 2004

Debra R. Carney, CCR, RPR
ACCURATE COURT REPORTING
Fall School Business Center
1130 Eighth Avenue South, Suite 400
Nashville, TN 37203
(615) 244-3376 or 244-DEPO

* * *

[p. 11]

* * *

Q. So that's how you first met Gene Hughes?

A. Yes.

Q. All right. Tell me about your dealings with him. I mean, how did you find dealing with him?

A. I felt very uncomfortable around Mr. Hughes.

Q. From the get-go?

A. Yes.

Q. Okay.

A. He was very arrogant, and he always -- whenever I would speak to him, he would grab himself. He would grab his crouch.

[p. 12]

Q. Whenever you would speak to him?

A. I would say, "what's up?"

Q. Wait. This is from the beginning?

A. Yes.

Q. From the first time you met him?

A. As far as in the hallways, yes.

Q. So --

A. Yes.

Q. From your first interaction -- the first time you met Gene Hughes, he grabbed his crouch?

A. Yes.

Q. Okay. Do you recall where you were when this happened?

A. In the hallway outside his office.

Q. Who else was there?

A. The receptionist at the front desk was sitting there.

Q. Who is that?

A. Who was that?

Q. Yeah.

A. As far as -- Judy Lowe is her name.

Q. L-O-W-E?

A. L-O-W-E.

Q. Do you recall the conversation leading up to that incident?

[p. 13]

A. No. It was just -- it would be a matter of me seeing him, speaking to him, and whenever I would say, "what's up," he would always grab his crouch an would respond, "You know what's up."

Q. Okay. And this happened as early as August 2001 when you first met him?

A. Yes.

Q. How else -- tell me what else he did during your interactions with him.

A. There was times that he -- I had a window in my office, and he would come up to my window.

Q. From the outside?

A. Yes.

Q. Because you were on the first floor?

A. Yes. And he would knock on the window and would press his crouch to the window.

Q. Okay.

A. Times he would come to my window and ask to see -- he would say, "Let me see your titties."

Q. Okay.

A. There was another incident where he came into my office, and I asked him what I could do to help him, and he grabbed my head to his crouch and said, "You can help me this way."

Q. Okay.

[p. 14]

A. After that, I didn't have any other interaction with him at all.

Q. All right. The time period that we're talking about that you just described all these incidences, you would say would stretch from August 2001 until when?

A. To May 2002.

Q. How are you able to put that May 2002 date on it?

A. Because that's when I returned from my -- I had been out on sick leave, and he came down to my office to see how I was feeling when it happened. That's how I can remember it, because I had just returned from a hospital visit.

Q. The pulling-your-head-to-his-crouch incident?

A. Yes.

Q. Okay. So your testimony is -- how long from you out on sick leave prior to May 2002?

A. I was out all the month of April and most of the month of May.

Q. Six, seven, eight weeks?

A. Yes.

Q. So after not being in the office and not seeing Gene Hughes for six, seven, or eight weeks, he comes down to your office to see how you're doing?

A. Yes.

[p. 15]

Q. And then pulls your head down to his crouch?

A. Yes.

Q. How did you react.

A. Told him -- pushed him away and told him to get the hell out of my office.

Q. And then you didn't have any other interactions with him after May of 2002?

A. No, sir.

Q. Who did you report that to?

A. No one.

Q. Why?

A. He is in charge of the office that would -- I would normally go to, employee relations.

Q. All right. Well, you're a long-time employee of the school system. Right?

A. Yes.

Q. Your understanding was, the only place you could make a report of that conduct to would be to Gene Hughes?

A. To employee relations office, yes, sir.

* * *

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* * *

Q. So do you recall the date you went to talk to Delaine Linville and Veronica Fraizer?

A. Not the actual date. It was in the month of July.

Q. Right. Have you ever seen their notes on your meeting?

[p. 20]

A. Yes. I've seen this before.

Q. Do you agree with me there's a date of July 22, 2002 up there?

A. Yes.

Q. Would you agree with me that that would be the date that you met with Veronica and Delaine?

A. Yes.

Q. I'm not going to ask you any more questions about that. I was trying to nail down the date.

So tell me what happened at this meeting. I mean, did you know what you were going to meet with them for before you went there?

A. No, sir.

Q. Did you know there was an investigation of Gene Hughes before you went there?

A. No, sir.

Q. Okay. So you went there not knowing what to expect, really?

A. That's correct.

Q. So tell me how they started the conversation.

A. They asked what my job was. They asked what -- where my office was. They asked who I normally dealt with on a daily basis as far as the different departments and why I would have to work with that individual department. Then they asked me my -- where my office was in

[p. 21]

relationship to Mr. Hughes' office, what I had to do -- how my office interacted with his office. And then they asked if I had -- if he had ever, as far as inappropriate behavior, conducted himself in an inappropriate way.

Q. All right. And then -- you tell me if I'm putting words in your mouth, but then you told them the things that you told us about 15 minutes ago here in this deposition?

A. That's correct.

Q. The various instances of inappropriate conduct by Mr. Hughes?

A. That's correct.

Q. All right. Were you afraid of losing your job by telling them that?

A. Yes.

Q. Why?

A. Because of the relationship that Mr. Hughes had with Dr. Garcia.

Q. What relationship is that?

A. As far as it was common knowledge that they were very good friends and that I felt like that if I testified against him, that I would lose my job.

* * *

[p. 23]

* * *

Q. Would you agree with me that the individual witnesses in terms of what they said, what each witness said is not -- that these witnesses are not named in the report itself?

A. That's correct.

Q. So while the contents of what the witnesses said was summarized, the identity of what each witness supposedly said does not appear in this report. Do you agree?

[p. 24]

A. I agree.

MR. YOUNG: All right. First, I'd move this in as the first exhibit.

(Fact Finding Report marked Exhibit 1 to this deposition.)

Q. (By Mr. Young) Now, what day were you put on administrative suspension with pay?

A. November 6th, 2002.

Q. And it's your contention in this lawsuit that you were placed on administrative suspension without pay

in November of 2002 and ultimately terminated, I believe on January 6th of 2003?

A. That's correct.

Q. Because of the statements you gave to Veronica and Delaine on July 22, 2002. Right?

A. Yes.

Q. How do you know that what you told Veronica and Delaine on July 22 was ever communicated to Chris Henson or Dr. Garcia?

A. Would you repeat that?

Q. How do you know that what you told Veronica and Delaine Linville on July 22 was communicated to Chris Henson or Dr. Garcia?

A. I don't know that it was communicated. I do know that I was -- had not been -- my work performance had

[p. 25]

not been questioned or I had not been reprimanded for any mishandling of payroll issues until after the report was released.

Q. All right. But you don't know that Veronica or Delaine told Dr. Garcia or Chris Henson that you, Vicky Crawford, said specific things that are mentioned in this report. Correct?

A. I don't know that.

Q. So your theory is that because you made these statements on July 22, you were placed on administrative suspension on November 6th and ultimately terminated on February 6th, 2003. Right?

A. Yes.

Q. And you're assuming that because you had never -- you contend you never had any problems with your work performance prior to the November 6th letter or the November 6th administrative suspension. Right?

A. Right.

Q. What other evidence do you have to support your theory that your statements on July 22 to these two investigators resulted in you being suspended and ultimately terminated?

A. Because I was -- they investigated the three of us that testified against Mr. Hughes. Metro investigated us after our testimony, and that's when they started the

[p. 26]

auditing and investigation in the payroll department.

Q. Okay. And so you think it's more than a coincidence?

A. I sure do.

Q. Why?

A. Because I hadn't been investigated for any allegations of mishandling of payroll or checks in any way until after the report came out.

Q. How did Chris Henson or Dr. Garcia know that it was you who made negative statements about Mr. Hughes in your July 22nd interview?

A. I don't know how. They would have been told by Veronica Fraizer.

Q. You're assuming that?

A. Yes.

Q. But you just testified a few minutes ago that you have no proof that Veronica Fraizer --

A. That's right. I have no proof.

MS. STEINER: I'm going to object to the use of the term "proof." She has no actual knowledge of a discussion. I believe that's what she meant as opposed to proof.

MR. YOUNG: Are you finished?

MS. STEINER: Yes.

Q. (By Mr. Young) Well, your attorney just said

[p. 27]

that you have no actual knowledge of the discussion. You don't know if there ever was a discussion between

Veronica, Delaine and Chris Henson and Dr. Garcia about what you told Veronica and Delaine, do you?

A. That's right.

* * *

[p. 51]

STATE OF TENNESSEE)
)
COUNTY OF DAVIDSON)

I, DEBRA R. CARNEY, Registered Professional Reporter, Court Reporter and Notary Public in and for the State of Tennessee at Large,

DO HEREBY CERTIFY that the foregoing proceedings were taken at the time and place set forth in the caption thereof; that the witness therein was duly sworn on oath to testify the truth; that the proceedings were stenographically reported by me in the shorthand; and that the foregoing proceedings constitute a true and correct transcript of said proceedings to the best of my ability.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties hereto, nor a relative or employee of such attorney or counsel, nor do I have any interest in the outcome or events of this action.

IN WITNESS WHEREOF, I have hereunto affixed my official seal and signature this 9th day of July, 2004, at Nashville, Davidson County, Tennessee.

/s/ _____
Debra R. Carney, CCR, RPR
Notary Public at Large
State of Tennessee
My Commission Expires: November 25, 2006

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

Case No. 3:03-0587

[Dated April 28, 2004]

DIANNE B. PROFFITT,	)
	)
Plaintiff,	)
	)
Vs.	)
	)
THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, et al.,	)
	)
Defendants.	)

Deposition of :

VERONICA THOMPSON FRAZIER

Taken on behalf of the Plaintiff
April 28, 2004

SARAH N. LINDER
Elite Reporting Services
P.O. Box 292382
Nashville, TN 37229
(615) 595-0073

* * *

[p. 5]

* * *

VERONICA THOMPSON FRAZIER,

was called as a witness, and having: first been duly sworn testifies as follows:

DIRECT EXAMINATION

QUESTIONS BY MS. STEINER:

Q. Could you please state your full name for the record.

A. Veronica Frazier.

Q. And do you have a middle --

A. T.

Q. T?

A. Uh-huh. Thompson. Veronica Thompson Frazier.

Q. It's my understanding you work for Metro; is that correct?

A. That's correct.

Q. What is your position with Metro?

A. Assistant director of human resources.

Q. And how long have you held that position?

A. I'd have to stop and look, I'm not sure. It's going on two years.

Q. Two years. And what -- who promoted you to that position?

A. Billy Lynch. He's now the director of public

[p. 6]

works, but he was the director of human resources.

Q. How long have you be[illegible]n with Metro?

A. Since September 16th, 1994.

Q. And do you have any plans of leaving Metro in the near future?

A. No.

Q. What is your home address?

A. 713-A Crescent Road.

Q. Is that in Nashville?

A. That's correct.

Q. Now, as the assistant director of human resources are you responsible for investigating complaints of discrimination at Metro?

A. Yes.

Q. When you investigate those complaints, is there a procedure that you follow?

A. Yes.

Q. What is it?

A. Depending on where we get the complaint from, whether it's an employee or manager, we interview the employer, try to ascertain exactly what is the nature of the complaint. Some complaints don't rise to the level of an EEO investigation and some do. Those that do, we get the pertinent information from the employee including the list of individuals that we'll need to interview. We -- at

[p. 7]

that point we let the department head know that we're going to be doing an investigation and that we will be interviewing individuals within their department. And we need a contact person because we don't want to disrupt their workplace and to let their supervisor know that we will be interviewing them. And we set up a schedule and begin a process.

Q. Okay. Now, when you set up the schedule, do you let the person that they're complaining about know the nature of the complaint?

A. No.

Q. You don't?

A. We let them -- well, we won't -- we'll let them know that we have a complaint that is an EEO complaint. And generally folks know that because if they're getting a call from me, doing an investigation. But I don't go into any specifics of the complaint. In fact, when folks come in, I have people come in that they really don't know why -- exactly why they're there because it's -- it's not to blind side folks, but it's to keep a very objective forum as we try and discuss the complaint.

Q. When you discuss the complaint with them, do you let the complaining party know the specifics of the complaint?

A. No. At that time?

[p. 8]

MR. SAFLEY: That question didn't make sense.

BY MS. STEINER:

Q. Do you let -- the party that's being complained against, do you let them know the specifics of the complaint when you're conducting your interview with them?

A. To follow-up with them -- the person -- let me get this straight with you. Say, the alleged perpetrator -- do we keep the alleged perpetrator informed?

Q. Yes.

A. No. I mean, no.

Q. So then if you've got a complaint against someone when you're conducting your investigation, you never sit down and let that person know the specifics of the complaint against them?

A. They know there's a complaint but not the specifics, no.

Q. Do you ever question them about whether or not they engaged in the conduct as alleged --

A. We interview the perpetrator, yeah. As part of the investigation, we interview the alleged perpetrator; there may be several. Yeah, absolutely we interview them and ask questions, certainly.

Q. So when you interview --

A. Otherwise, we couldn't do an investigation.

Q. Sure. That's what I'm saying. When you interview

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the alleged perpetrator, do you let them know the nature of the complaint against them in terms of someone said you did X, Y, and Z?

A. We won't say the person's name. I stick to behaviors, have you ever said, have you ever done, have you ever conducted.

Q. Okay.

A. And I'll be very specific about those -- the language, the statements, the behaviors.

Q. And why do you not give specific names?

A. Because what we're trying to find out -- well, I give specific names to try and keep some anonymity about the folks who are complaining during the course of the investigation. What I try to do is maintain the integrity of the investigative process. And sometimes I don't know what folks are going to do.

I mean, this is -- you know, we are the first recourse and I don't want folks discussing this in their workplace. I don't want them going back having conversations about what went on in and investigate during the discussions that we had, so I keep names out of it. And that way when I try to corroborate, when we look back at testimony and try to corroborate statements that had been, then there's kind of a blank slate there; this person said this, this person said that and no we never use names

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during. What they would corroborate is the statements that were made or the behavior that was made.

Q. Now, if someone complains to you that a specific manager engaged in certain statements and you ask that manager, did you engage in those statement, is it a fair statement that you would -- if the manager did engage in those statements that then manager would know who he said those statements to?

A. Absolutely, I think. I mean, if, indeed, that happen, he would know.

Q. So then even though you try to keep everything anonymous, is it a fair statement that if the party who was the alleged perpetrator actually engaged in activities that you would know that he would know who made the complaint against him?

A. Yeah. I think that certainly can happen during an the course of an investigation, yeah. I mean, common sense would dictate that; were you on the second floor -- whatever it may be. Were you on the second floor in so and so's office in the building and the person will think, well, the only person I was ever in that room with was -- certainly common sense would dictate that.

Q. Okay. Now, on top of that, it looks like you also do these fact finding reports. Do you do that all the time?

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A. That's one of my assignments. I don't do it all the time.

Q. When you do the fact finding report, who gets a copy of those reports?

A. The department head gets a copy of that report and the complainant, the alleged perpetrator. But what we like to do is let the department head distribute those reports and discussions with the employees within his department.

Q. So then when you give out these fact finding reports, it's being passed out with the emphasis that the department head will sit down and speak to the involved parties?

A. Uh-huh.

Q. Is that a yes for a record?

A. That's yes. Yes. I'm sorry.

Q. Now, also too when you're investigating these complaints of discrimination, were you aware that the law prohibits retaliation?

A. And I advise client -- I don't have clients. I advise employees that retaliation is prohibited because that's often -- it is usual for employees to bring that up to me.

Q. Sure. Now, besides telling the employees that retaliation is illegal, do you tell the alleged harassers that they cannot engage in retaliation?

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A. Absolutely, every single time.

Q. And also, it looks like you send letters as well, don't you?

A. Uh- huh.

Q. Is that a yes?

A. Yes, I do. Yes, I do.

Q. And is it your procedure to send a letter to all parties involved that there can be no retaliation?

A. If I don' t send a letter, we'll make it verbal or we'll have an e-mail that will say that.

Q. What makes you decide as to whether or not it's verbal, or e-mail, or letter?

A. I may be -- well, I may be directly communicating with the department head; the request may come from them. And I'll say, remember as we go forward with this investigation -- but that is something that I am really adamant about, be careful, retaliation is an issue, you may feel like -- whatever. I make sure.

Q. And it sounds like you inform the department head and the supervisor that they cannot retaliate against the people who have made the complaint, correct?

A. The person's -- the individual's direct supervisor?

Q. Yes.

A. Now, I may not have direct conversation with that supervisor every single time, but I let management in that

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department know, whether it be the department head, division manager, and it may be the supervisor, but folks are made aware, absolutely.

Q. And is it a fair statement, too, that you let the department head know that he's supposed to pass on the message to the supervisors that there can be no retaliation?

A. Certainly.

Q. And so then the department head would tell the supervisor who would tell the alleged harasser that they cannot engage in any retaliation?

A. Right.

Q. And that's done from the word go when the investigation first begins?

A. Absolutely.

Q. So then is it a fair then that the department head, supervisor, and the alleged harasser know the individuals who have made the complaint and know that they cannot retaliate against those individuals?

A. That's a fair statement and that's something that I advise. Now, can I absolutely have 100 percent confidence, I'd like to but . . .

Q. And that's a procedure that you use at Metro?

A. Yeah. Absolutely.

* * *

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* * *

Q. Now, what was the next step that you took in doing this investigation?

A. I met with -- talked with Jennifer. I can't remember whether we met face to face or talked to get some of the particulars. And then we met with Dr. Garcia and that's where I gave my comments and observations about retaliatory actions. We also advised that Mr. Hughes be removed from doing any sexual harassment investigations because it was -- one was being conducted about him. We thought that would be an inappropriate way to proceed.

Let me see. And how we would set up -- contact folks. If memory serves me, there was some difficultly because it was summer and folks were on vacation because we

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had some lapses trying to set up interviews with folks, so we were contacting folks directly. And I think we had some conversations because we always ask may we contact folks directly or do we need to go through -- so here we contacted folks directly, I believe.

Q. Now, in the initial conversation with Dr. Garcia, did you go to his office or was that over the telephone?

A. We were in his office.

Q. And that's the one where you gave your typical speech -- excuse me, not speech. But you made your typical statements about how you cannot retaliate against these individuals who had complained?

A. Right.

Q. And so at that point, did you tell them the names of the specific individuals?

A. No, I don't believe we talked about -- I don't remember if we talked about specific -- I'm trying to recall. We had -- we had -- Tamara Saddler is a name that comes to my mind, Dianne, and there were some other folks, but employees in HR. And I can't remember when we made it clear to Dr. Garcia that these -- these complaining employees -- I used the term it may feel like these folks are holding your workplace hostage, and in a way they are, but you must be careful and not proceed with actions that could be perceived as retaliatory.

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Q. Okay.

A. And I'm sorry about my recollection of this but it's just been too long ago.

Q. That's fine. But you do know that Ms. Saddler was one of the employees?

A. Ms. Saddler, Dianne Proffitt. And I'd have to go back, I don't have the folder in front of me.

Q. What about Vicky Crawford?

A. I'm not sure when we got Vicky Crawford's name.

Q. Okay. So her name could have come into the picture a little bit after the --

A. After, uh-huh.

Q. -- first meeting? But at the first meeting, thought, you can recall --

A. I can recall Ms. Saddler. I don't want to say a hundred percent Dianne Proffitt. I'm not certain there. I'm not trusting my memory right now.

Q. Okay. Is it a fair statement, though, that when you found out the names of the other people who were involved in this, you told them likewise you cannot retaliate?

A. I don't know if we went over every specific individual but we said those folks who participate in the investigation should not, again -- should be able to go forward without fear of retaliation?

* * *

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* * *

Q. Can you tell me the date that you interviewed

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Dianne Proffitt?

A. I have on here 6/24, 2:00 p.m., so assuming that there wasn't a cancellation, that this was the date I interviewed her and the time I interviewed her.

Q. Do you know whether or not Ms. Proffitt informed you of any inappropriate conduct by Dr. Hughes?

A. I recall that she did.

Q. And do you recall what she informed you of?

A. I'd need to go back and look through the file. But if I remember correctly -- well, her specific complaints, I'm not sure. In general, the complaints she had about Dr. Hughes was his language. And I can't pinpoint which witness said what about him, but his inappropriate remarks, that he would grab his crotch. I remember statements like, I want to say, bite me, those sorts of things. And I'm not sure which ones specifically Ms. Proffitt made but she clearly had some.

Q. Okay. I want to ask you about some of the people listed in the fact-finding report. Jennifer Bozeman, did you interview her?

A. She was the first person who gave me -- essentially, it was the information that had been brought to her attention.

Q. Did she make any complaints about Gene Hughes to you?

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A. Huh-uh, no.

Q. Did she make any complaints about Gene Hughes being difficult to work with?

A. I don't recall.

Q. Now, Diane Burden, do you recall interviewing her?

A. Yeah, I do.

Q. Did she make any complaints about Gene Hughes?

A. I'd have to go back and look at my notes. But what I do recall Ms. Burden complaining about, one individual that she complained about was Vicky Crawford.

Q. Okay. Do you recall whether or not Diane Burden made any complaints about Gene Hughes, though?

A. I'd have to look back at my notes.

Q. Do you know why you interviewed Diane Burden?

A. Her name was given to me.

Q. By whom?

A. I can't remember.

Q. Vicky Crawford, do you know whether or not she made any allegations against Gene Hughes?

A. I remember that Vicky did.

Q. What about Jackie Gauthier?

A. I can't even remember who she is. What was her position?

Q. She was his secretary.

A. No, I don't believe she made any.

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Q. What were the nature of Vicky Crawford's remarks?

A. One thing I remember Vicky Crawford stating was they had banter back and forth, Mr. Hughes and Vicky Crawford, that was inappropriate. And Vicky Crawford acknowledged that sometimes she would engage in that as well and Mr. Hughes would in turn have comments. And I believe that may have been the bite me statement and the grab the crotch there.

Q. Okay. Anything else?

A. Nothing that I can recall.

* * *

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* * *

Q. Now, in the second observation that you've got here you said that Dr. Hughes did participate in inappropriate and unprofessional behavior. Does that equate to sexual harassment?

A. No.

Q. How does that compare to sexual harassment?

A. I think there's a big difference between inappropriate and unprofessional behavior. Everybody that participated in -- people who are sexual harassers can -- we have federal laws, we have Title 7, 1964 Civil Rights Act. We don't have federal laws against inappropriate, unprofessional behavior or the federal court system would be jammed for eternity.

Q. Okay. The statements that -- what exactly were the statements that you found that Dr. Hughes actually engaged in?

A. I'd have to go back and review notes. As my best

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recollection, I do remember bite me was one that was an allegation made against him and, that, he even acknowledged. And I do recall the banter between Ms. Crawford and Mr. Hughes being inappropriate, unprofessional for both parties. And there were -- more

than one witness said that he would grab his crotch, which would be clearly inappropriate.

Q. Well, grabbing his crotch, could that also constitute sexual harassment?

A. I think that if -- certainly, there could be circumstances where it could, but I believe Ms. Crawford engaged -- their conversations and their actions, she acknowledged that she would flip him a bird, that she -- it became banter in what was clearly inappropriate, unprofessional. But they had sort of established that is their interaction in workplace culture, if you will. But it did not make it appropriate and it is clearly inappropriate and unprofessional.

Q. What about the witness that claimed Dr. Hughes entered her office and pulled the witness' head into his crotch, could that constitute sexual harassment?

A. Yeah, we never could corroborate that.

Q. Meaning, you only had one witness?

A. Correct.

Q. And Dr. Hughes denied it?

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A. Right. We had no one else who had seen that.

Q. Okay. So then you need two witnesses to corroborate sexual harassment?

MR. SAFLEY: Object to the form.

BY MS. STEINER:

Q. Is that what you were saying?

A. We would not say that the action -- we were doing a fact-finding report and we tried to present the facts; what the witness said happened. And if we couldn't find a corroboration, we would -- it would end up being a he said, she said circumstance.

Q. Okay. Who said that Dr. Hughes did that to her?

A. I don t recall.

Q. Do you know who made the statements when they said hi to him, he grabbed his crotch and stated, I'll tell you what's up? Do you recall who said that?

A. I can't recall. I'm just -- since I can't recall, I have an idea but I can't recall specifically.

Q. Is it a fair statement then, though, that several witnesses did make several different statements of him engaging in conduct, if corroborated, could constitute sexual harassment?

A. If corroborated and if he were the only one engaging in that behavior. But from what we -- our investigation when there are two employees, two co-workers,

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who engage in that inappropriate -- I'll call it inappropriate, unprofessional conduct, they don't consider themselves sexually harassing one another. It becomes part of, as I said, the workplace culture.

* * *

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CERTIFICATE

STATE OF TENNESSEE

COUNTY OF DAVIDSON

I, SARAH N. LINDER, court reporter, with offices in Nashville, Tennessee, hereby certify that I reported the foregoing deposition of **VERONICA THOMPSON FRAZIER** by machine shorthand to the best of my skills and abilities, and thereafter the same was reduced to typewritten form by me.

I further certify that I am not related to any of the parties named herein, nor their counsel, and have no interest, financial or otherwise, in the outcome of the proceedings.

/s/_____
SARAH N. LINDER
Notary Public at Large
State of Tennessee

My Commission Expires: 3/26/2005

IN THE UNITED STATES DISTRICT COURT FOR TENNESSEE FOR THE MIDDLE DISTRICT NASHVILLE DIVISION

Case No. 3:03-1167

[Dated April 30, 2004]

DIANNE B. PROFFITT,

Plaintiff,

Vs.

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE; DR. JULIE WILLIAMS; AND PEDRO GARCIA,

Defendants.

JURY DEMAND
Judge Trauger
Magistrate Judge Brown

IN THE CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE AT NASHVILLE

Case No. 03C-1455

VICKY S. CRAWFORD,

Plaintiff,

Vs.)
)
THE METROPOLITAN GOVERNMENT)
OF NASHVILLE AND DAVIDSON)
COUNTY, TENNESSEE; DR. PEDRO)
GARCIA, AND CHRIS M. HENSEN,)
)
Defendants.)
)

IN THE UNITED STATES DISTRICT COURT FOR TENNESSEE FOR THE MIDDLE DISTRICT NASHVILLE DIVISION

Case No. 3:03-0096

VICKY S. CRAWFORD,)
)
Plaintiff,)
)
vs.)
)
THE METROPOLITAN GOVERNMENT)
OF NASHVILLE AND DAVIDSON)
COUNTY, TENNESSEE; DR. GENE)
HUGHES and DR. PEDRO GARCIA,)
)
Defendants.)
)

JURY DEMAND
Judge Campbell
Magistrate Judge Brown

JA 53

Deposition of:

DR. PEDRO ENRIQUE GARCIA

Taken on behalf of the Plaintiffs
April 30, 2004

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Nashville, Tennessee 37229
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* * *

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* * *

Q. What do you understand about discrimination laws? What's your understanding about the laws?

MS. MARTIN: Object to the form of the question.

BY MS. STEINER:

Q. About the discrimination laws?

A. I know the policy.

Q. What is the policy?

A. For sexual harassment and discrimination?

Q. Yes.

A. You cannot be -- discriminate against another individual. And if it's -- and then it identifies whether it's sexual, et cetera, and it talks about what you do if you're discriminated against and who you go to. You have the four or five choices of who to go to. So it has the stipulation on retaliation.

Q. And what type of discrimination is prohibited?

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What are the areas; do you know?

A. Sexual. There's a number of things listed there.

Q. What are the other areas listed there? Besides sexual, can you tell me any other area that Metro doesn't discriminate?

A. We don't discriminate on race, origin, religion, handicapped condition, et cetera.

Q. Did you know when you took over as Director of Schools that you cannot retaliate against someone for making a charge of discrimination?

A. Absolutely.

Q. Is it a fair statement then that you knew that the individuals that participated in the investigation against Gene Hughes could not be retaliated against?

A. That's correct.

Q. And is it a fair statement that you needed to know the names of the individuals to know who not to retaliate against?

A. I didn't know the names of the individuals that filed the claims against Gene Hughes for sexual harassment until I received the report in, I believe it was September of '02 I think it was.

* * *

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Q. Now, when you first met with her about Gene Hughes, when was this?

A. I do not know. I don't recall.

Q. Do you know whether or not it was May of 2002?

A. It could have been. I do not know.

Q. Did you keep anything on your calendar that would let you know when you first met with Jennifer Bozeman?

A. No.

Q. And so, was the meeting actually in your office?

A. That's correct.

Q. What did she tell you?

A. She told me that there was a concern. That she was concerned because there were allegations of sexual harassment against Gene Hughes, and her concern was that he -- he was the sexual harassment investigator. It would be -- was a major concern.

Q. And did you ask her any questions about the nature of the complaints?

A. No.

Q. Did it give you any concerns that she told you that there were complaints of this nature?

A. Yes. Sure. And she said that she was going to have an investigator, someone else other than Metro legal to investigate it. That's what we always do.

Q. Did she ask you for any input, or was she just

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telling you what was going to be set up?

A. She was telling -- she was telling me what she thought should happen and I agreed.

Q. Okay. Now, and you didn't ask her the specifics of the complaint?

A. No.

Q. Okay. Did she indicate to you the names of any of the parties complaining?

A. No.

Q. Did she mention Dianne Proffitt's name at all in that conversion?

A. No. Not that I recall.

Q. Did you know who Dianne Proffitt was?

A. Not 'til today.

Q. Okay. Did you know whether or not Dianne Proffitt worked under Gene Hughes in the Employee Relations Department?

A. No.

Q. Okay. Now, what procedure did Ms. Bozeman tell you would be set up to investigate this complaint?

A. She was going to have another person do an investigation and then she came in and brought the lady, Veronica, I don't know her name.

Q. Frazier?

A. Yeah, correct.

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Q. And did Ms. Frazier meet with you?

A. Yes, she did.

Q. And when she had the meeting with you, do you recall the date of this meeting?

A. No. It was after my meeting with Jennifer, initial meeting with Jennifer.

Q. Do you recall whether or not it was late May, early June of 2002?

A. No.

Q. Do you have any idea when this meeting was?

A. Where?

Q. When. Do you have any idea when the meeting was?

A. As far as time of the day or --

Q. The date, the actual date?

A. No, I do not.

Q. Would this be on your calendar?

A. I do not keep a calendar. My secretary keeps a calendar. She may be able to go back. I don't know. She may be able to go back in the computer and identify it. My calendar is on the computer.

Q. Okay. Now, when you met with Veronica Frazier, who was present in the meeting?

A. I think it was Jennifer Bozeman, Ms. Frazier, and myself.

Q. And what was said in this meeting?

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A. Just that she was going to investigate it, and she was going to call witnesses and talk to them and then she would give us a report.

Q. And did she tell you in the meeting that you could not retaliate?

A. I do not recall whether that was a conversation or not, but I am aware of -- but I understand the policy, so I understand that you cannot retaliate.

Q. Okay. Did she ever send you a letter stating or an e-mail stating that you cannot retaliate against the individuals that are involved in the investigation?

A. I do not recall whether she did or not.

Q. Okay. And do you recall Ms. Frazier telling you the specific names of the individuals in this meeting?

A. No.

Q. Do you recall the names of Dianne Proffitt, Vicky Crawford, or Tamara Sadler coming up in this meeting?

A. No.

Q. Are you saying that the names did not come up, or you just can't recall whether or not specific names were mentioned?

A. I don't know whether they were brought up or not, because I really didn't know who made the accusation. To my recollection I did not know -- I didn't know who made the accusations until -- I really never knew.

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I made the assumption when I saw the report back in, I think it was like -- whenever it came, September, October. So whenever the report came back, it had the names of witnesses in there, and I assumed that some of those had to have been the people that were -- that made the accusation.

Q. So then, are you saying before the date of the report, you can't recall hearing the specific names of the people who made the accusations?

A. Not officially, no.

Q. Unofficially, did you hear the names of the people that had complained?

A. The only thing that I -- I know is that it was an assumption as to who would have made it.

Q. What was your assumption?

A. My assumption was when I -- I spoke with Gene Hughes right after, and I told him that there was an investigation against him.

Q. Uh-huh.

A. And at that time he indicated that he thought it had to do with Vicky Crawford and Tamara Sadler.

Q. And was this after -- directly after your meeting with Jennifer Bozeman?

A. Yes. And we agreed that I needed to notify him of this investigation, and so I did. I met with him. He came

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to my office and I told him. And he said, "Well, this is a retaliation for my investigating the Sick Bank."

Q. Okay. Now, what investigation did he do of the Sick Bank?

A. I do not know.

Q. Okay. Did he ever tell you before this point that he was investigating the Sick Bank?

A. Yes.

Q. Do you know whether or not he ever showed you any documents showing his investigation of the Sick Bank?

A. No.

Q. What was his allegation about -- strike that.

Why was he investigating the Sick Bank?

A. I -- the only thing that -- he came into my office one day and said that he found -- he had found some things that did not look correct, improprieties. And that he -- I said, "Well, go ahead and investigate it."

Q. And what did he find that were -- that he thought I were improprieties?

A. I never heard.

Q. Okay. When did he come into your office and tell you that?

A. I do not know.

Q. Do you have any written documents going back and forth between you and Gene Hughes or any other department

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at Metro showing that there was an investigation of the Sick Bank?

A. No.

Q. Did you have any follow-up conversations with Gene Hughes about his investigation of the Sick Bank?

A. No.

Q. Do you know whether or not there were ever any improprieties in the Sick Bank?

A. No.

Q. Do you know whether or not Tamara Sadler was even involved with the Sick Bank?

A. The only reason that I would think that Tamara Sadler -- I do not know. I'm only making an assumption. The only reason I would think Tamara Sadler would be involved In the Sick Bank is because Tamara Sadler held the position that Gene Hughes held before he -- before he came on board.

Q. Okay.

A. And I think that the Sick Bank was either managed or supervised by that position. So, I'm making an assumption that if Gene Hughes did it, she must have done it before since she held that position.

Q. Now, did you ever hear any statements from anyone at Metro that Vicky Crawford was untruthful?

A. Untruthful, no.

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Q. What about Dianne Proffitt, did you ever hear any statements that she was untruthful?

A. No.

Q. And Tamara Sadler, did you ever hear any statements that she was untruthful?

A. Untruthful, no.

Q. Or that any of these three individuals had ever misrepresented anything?

A. No.

Q. Okay. Now, when you had the meeting with Jennifer Bozeman in your office, was Gene Hughes present in that meeting?

A. Uh-huh. When?

Q. Yes.

MR. YOUNG: Wait a minute. Hold it. I object to the vagueness of that question.

BY MS. STEINER:

Q. When you had the first meeting with Jennifer Bozeman in your office, was Gene Hughes present?

A. No.

Q. Was he ever present in any meetings you had with Jennifer Bozeman?

A. No.

Q. Did you have any follow-up meetings with Jennifer Bozeman?

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A. About what?

Q. About the investigation of Gene Hughes.

A. No.

Q. Did you request that you be updated as to the results of the investigation?

A. No.

Q. Did you want to be updated as to the results of the investigation?

A. Not updated. I wanted to get final -- the final results of the final findings.

Q. Okay. Did you know that besides Gene Hughes that you were under an obligation not to retaliate against the individuals who made the charge of discrimination?

A. Of course.

Q. And what was your plan about how you wouldn't retaliate? What were you going to do? Did you -- meaning did you --

A. I don't understand what you mean.

Q. Strike that question. It was a bad question anyways.

Did you know Dianne Proffitt before the investigation of Gene Hughes took place?

A. No.

Q. Did you know Vicky Crawford?

A. No.

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Q. Did you know Tamara Sadler?

A. Yes.

Q. How did you know Tamara Sadler?

A. When I -- it had to -- I had met Tamara Sadler when -- when I first came to the district and she was the Director of Employee Relations.

Q. Okay.

A. So, we had a couple investigations that she had done and that's how I learned who she was.

Q. Did you ever have any discussions with her about Amy Collins?

A. Tamara Sadler?

Q. Yes.

A. No.

Q. Okay. Were you able to work well with Tamara Sadler?

A. I didn't work with Tamara Sadler.

Q. Well, the few discussions you had --

A. I never have any discussions. You asked me if I knew who she was, and I said yes, because I knew that she had done the investigations of those cases.

Q. Had you ever then met her before the invitation of Gene Hughes?

A. Yes. Because she had been transferred to work for Faye Goodman, and I went into that office once in a while

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to see Faye Goodman. She was her secretary.

Q. Did you ever have any problems dealing with Tamara Sadler before this investigation of Gene Hughes?

A. No.

Q. Now, did you ask Gene Hughes about whether or not he had engaged in any inappropriate conduct with Vicky Crawford or Tamara Sadler?

A. The only -- the only time that I asked him -- that I spoke with him about sexual harassment charges were after I received the report and I -- and the report showed that he had -- that there was no -- they couldn't -- the accusations could not be corroborated.

But it did also show that he had maybe said things or -- and so at that time he was reprimanded verbally

for whatever his -- whatever -- whatever the report indicated. That he needed to watch his Ps and Qs and how he presented himself with the things that he said.

Q. Who reprimanded him verbally?

A. I did.

Q. Okay. Did you do any notation to his employee file or any other file that he had been reprimanded verbally?

A. No. It was verbal.

Q. What did you tell him verbally?

A. Well, that he -- well, that sexual harassment is -- is not allowed. That you have to watch what you say.

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People may misinterpret or misunderstand what you -- what you say. Sometimes you may be friendly, but you may not -- what you may think is friendly to you may not be what somebody else thinks is friendly, so you have to watch very carefully what you say and do. That sort of thing.

Q. Now, his direct supervisor at that point was Dr. Williams; is that correct?

A. That's correct.

Q. Did you let Dr. Williams know about the oral reprimand?

A. Yes.

Q. And did you let her know why he was being given this oral reprimand?

A. Yes.

Q. Okay. Now, let's back up just a little bit. Back when you had the first discussion with Gene Hughes, the very first discussion about the investigation and he mentioned the name of Vicky Crawford and Tamara Sadler, did you ask him at that point had he done any or made any inappropriate comments or gestures to anyone?

A. No. He indicated himself that he hadn't done anything, and he felt it was a retaliation for the Sick Bank.

Q. Okay.

A. The investigation on his part.

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Q. Okay. Now, did you convey that statement about the problems with the Sick Bank to anyone else?

A. That I do not recall. I do not know whether I spoke with anyone or not. I don't really know.

Q. Now, besides Gene Hughes did anyone else at Metro ever make any statements to you that reflected negatively on Vicky Crawford's job performance?

A. I don't know that Gene Hughes every made any negative statements about Vicky Crawford.

Q. Okay. Did anyone else make ever any negative statements about Vicky Crawford's job performance?

A. I spoke with Chris Henson about -- he spoke with me about issues related to Vicky Crawford.

Q. Did anyone else make any negative statements to you about Vicky Crawford's job performance?

A. Not that I'm aware.

Q. What about Tamara Sadler, did anyone make any negative statements to you about her job performance, outside of Gene Hughes?

A. Gene Hughes never made any negative statements about Tamara Sadler. The only thing that I'm aware of is when Tamara Sadler was moved from the Director of Employee Relations to secretary, I had heard rumors, but it was all hearsay, that she was going to retaliate against Gene Hughes, and she had made the statement, said, "I'm going to

[p. 85]

get that guy for getting my job," or something like that.

Q. Who did you hear that from?

A. I don't know. It was just hearsay.

Q. Can you name one witness who told you that?

A. No. No. It was just hearsay, and I never investigated it. I just heard those comments.

Q. Okay.

* * *

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* * *

Q. Did you set up any procedural safeguards to make sure that Gene Hughes did not have any supervisory authority over Ms. Proffitt, Ms. Sadler, or Ms. Crawford?

MR. YOUNG: And also, I object to the form.

BY MS. STEINER:

Q. You need to answer, Dr. Garcia.

A. I don't think that he was -- I don't believe that he -- I did not set any procedures, but I don't believe that he had any supervisory jurisdiction of any of those three individuals at that time.

Q. Okay. With regard to the Sick Bank, when you knew that he was being investigated for sexual harassment of the individuals that he said he was investigating with regard to the Sick Bank, did you set up any procedures at that point to make sure that any Sick Bank issues would be investigated by someone other than Gene Hughes?

A. No. Because the Sick Bank, he never said who he was -- all that he said was he found irregularities related to the Sick Bank, and at the time --

Oh, you mean when I talked to him about the sexual

[p. 99]

harassment charges?

Q. Yes, sir. Yes, sir.

A. Because he talked to me about the Sick Bank before the sexual harassment was filed.

Q. Sure.

A. All that he indicated was he felt that it was retaliation for the Sick Bank.

Q. Okay. When he told you this in the initial conversation with him about the investigation of him for sexual harassment, did you set up any procedural safeguards at that point to make sure that any investigation with regard to the Sick Bank would be conducted by someone other than Gene Hughes.

A. No. No. But in retrospect I should have maybe gone and talked to whoever the individuals were to make sure they didn't retaliate toward Gene Hughes either.

Q. Okay. Now, did anyone keep up with you with regard to the investigation and how it was going on before you received the final report?

A. No.

Q. Did you speak with any of the individuals at Metro, anyone, Gene Hughes, Tamara Sadler, Vicky Crawford, Diane Burden, Dianne Proffitt, Jennifer Bozeman, Veronica Frazier about that investigation before you actually got the final fact-finding report?

[p. 100]

A. No.

* * *

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* * *

Q. You read this whole report when you got it; is that correct?

A. That's correct.

Q. Did you ask any questions of anyone at that point to find out who exactly was fearful of the loss of their jobs and whether or not you needed to talk to those individuals or you needed to set up procedural safeguards for those individuals?

A. No. Because I never knew who the -- who the accusers were.

* * *

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* * *

Q. Did you have any concerns about the investigation of the Payroll Department maybe being conducted in retaliation for the complaint against Gene Hughes?

A. I -- I never -- I never made the two connections. I think the complaint on the Payroll Department came as a result of the audit that was being done by the -- by the auditors.

Q. Okay. Now, when you got this letter, did you have any discussions with anyone at Metro about whether or not you had -- whether or not --

A. Metro.

Q. -- this internal investigation had anything to do with the investigation against Gene Hughes?

A. Can you state that again?

Q. When you received this letter that you're looking at right now, the September 13th, 2002 letter --

A. I think actually this came with the investigation.

Q. Sure. With the fact-finding report; is that correct?

A. Correct.

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Q. Did you have any discussions with anyone about whether or not the investigation that Metro was going to do into the Payroll Department was in any manner, could be construed as retaliation against the individuals who had complained?

MR. YOUNG: I object to the form of that question.

MS. MARTIN: Object to the form.

THE WITNESS: No. The only thing that I -- the only time that I heard that there was an investigation being done was when Mr. Henson indicated that it was as a result of the audit. That he had asked or somebody had asked for additional outside investigation to look into the audit.

* * *

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REPORTER'S CERTIFICATE

STATE OF TENNESSEE

COUNTY OF DAVIDSON

I, Roy M. Curry, Jr., court reporter, with offices in Nashville, Tennessee, hereby certify that I reported the foregoing deposition of **DR. PEDRO ENRIQUE GARCIA** by machine shorthand to the best of my skills and abilities, and thereafter the same was reduced to typewritten form by me.

I further certify that I am not related to any of the parties named herein, nor their counsel, and have no interest, financial or otherwise, in the outcome of the proceedings.

/s/_____
ROY M. CURRY, JR., B.C. R., RPR, CRI, CCR
Bachelor's Degree of Court Reporting,
Registered Professional Reporter
Certified Reporting Instructor,
Certified Court Reporter, and
Notary Public State of Tennessee At Large

My Commission Expires: 3/27/2005

IN THE UNITED STATES DISTRICT COURT FOR TENNESSEE FOR THE MIDDLE DISTRICT NASHVILLE DIVISION

Case No. 3:03-1167

[Dated March 29, 2004]

DIANNE B. PROFFITT,

Plaintiff,

Vs.

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE; DR. JULIE WILLIAMS; AND PEDRO GARCIA,

Defendants.

JURY DEMAND
Judge Trauger
Magistrate Judge Brown

IN THE CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE AT NASHVILLE

Case No. 03C-1455

VICKY S. CRAWFORD,

Plaintiff,

Vs .

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE; DR. PEDRO GARCIA, AND CHRIS M. HENSON,

Defendants.

IN THE UNITED STATES DISTRICT COURT FOR TENNESSEE FOR THE MIDDLE DISTRICT NASHVILLE DIVISION

Case No. 3:03-0096

VICKY S. CRAWFORD,

Plaintiff,

vs.

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE; DR. GENE HUGHES and DR. PEDRO GARCIA,

Defendants.

JURY DEMAND
Judge Campbell
Magistrate Judge Brown

Deposition of:

CHRISTOPHER MASON HENSON

Taken on behalf of the Plaintiffs
March 29, 2004

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Nashville, Tennessee 37229
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[Text of this deposition incorporates Errata Sheet revisions for purposes of this appendix]

* * *

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* * *

Q. Okay. How did you know about the investigation of Dr. Hughes?

A. It was mentioned, but I don't remember the details. And the first time I saw the report from -- whether it be Metro HR or Metro Legal was when you gave me a copy at Ms. Crawford's disciplinary hearing.

Q. When you say, "It was mentioned," who first mentioned it to you?

A. I don't remember.

Q. Do you know whether or not it was Dr. Garcia or Ms. Williams?

A. I don't remember. All of the names were fairly new to me at the time since I had just begun in July. I didn't recognize a lot of the names.

Q. Did you have any job duties with regard to being told that this investigation had been -- was either being

[p. 17]

done or had been completed?

A. No.

Q. Okay. So then, whatever you heard would have been more in terms of just gossip?

A. I don't know if it was gossip. It was just something in passing.

Q. Okay. Before you came to work for Metro, did you know any of the other employees that worked here?

A. I knew Bob Bohnenstiel. I had worked with him in Sumner County.

Q. And how well had you known him?

A. Just a work relationship in Sumner County.

Q. Okay. Was he responsible for any of the finances in Sumner County?

A. Yes.

Q. Okay. And what was his job duty in Sumner County?

A. When -- when I left there, he was -- I think the title was Special Assistant to the Director of Schools.

Q. Okay. Meaning, was his job at Sumner County comparable to that which he did for Metro?

A. It was in as far as his prior assignment in Sumner County.

Q. Okay. And did you know anyone else other than Mr. Bohnenstiel?

A. Edith Jordan.

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Q. What was her position in Metro?

A. She is the Coordinator of Employee Benefits.

Q. Okay. Anyone else?

A. No.

Q. Okay. So, you didn't know Ms. Williams or Dr. Garcia --

A. No.

Q. -- or Gene Hughes before you came to work here?

A. No.

* * *

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* * *

Q. Okay. Now, Ms. Frazier back in 2002, what department did she work in, Veronica Frazier?

A. I don't know who that is.

Q. Okay. So, back in July or the Summer of 2002, Ms. Williams was in charge of the Human Resources Department?

A. Julie Williams?

Q. Yes.

A. Yes.

Q. And Gene Hughes was in charge of Employee Relations?

A. Correct.

Q. Which was a part of Human Resources?

A. Correct.

Q. And then Dr. Garcia, of course, was the -- the Director. So then if it was -- if you had to fire any

employee that worked under you, you would go through Human

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Resources and then you, along with Dr. Garcia and Human Resources, would make a decision about what to do?

A. That would typically be the scenario.

Q. Okay. For the cabinet meetings, do you know whether or not anyone keeps notes?

A. I assume that Julie Waters, Dr. Garcia's executive assistant, keeps notes.

Q. Do you ever have the notes, copies of them sent to you?

A. No.

Q. Do you ever have any sort of written agenda about what's going to be discussed in the cabinet meetings?

A. Yes. It's only come about fairly recently, but we do now.

Q. Back in 2002 did you do that?

A. No.

Q. Okay. Now, where was your office compared to Gene Hughes's office in 2002?

A. My office, they're on separate floors. My office is on the third floor -- I don't know which direction, closest to Berry Road. And Gene Hughes's office was on the second floor close to the front entrance --

Q. Okay.

A. -- of the Bransford Avenue side.

Q. Okay. Did you ever see Gene Hughes engage in any

[p. 23]

sort of conduct or actions that you thought were inappropriate?

A. No.

Q. Have you ever heard him make any remark, any sort of a sexual remark that you thought was inappropriate?

A. No.

Q. Have you ever heard him make any sort of remark about retaliating against people?

A. No. (Respite.)

I had very little interaction with him.

Q. Now, did you have any input into the investigation of sexual harassment that was conducted against Gene Hughes?

A. No.

Q. Did anyone keep you updated as to the results of that investigation?

A. No.

Q. Did you know whether or not employees from your department were being interviewed?

A. No.

Q. Should you have been made aware of the fact that employees from your department were being interviewed?

A. If there were situations where employees were being interviewed, I would at least expect that employee's immediate supervisor to be aware, but I don't know that I

[p. 24]

necessarily needed to be aware of that, if it were something that was on-going when I got here.

Q. Now, when you came to work for Metro in 2002, Mr. Bohnenstiel would have been about the only employee that you knew from your past jobs, correct?

A. And Edith Jordan.

Q. Yeah. And what is your relationship with Mr. Bohnenstiel? Were you friends?

A. No. We had just worked together.

Q. Okay. And where was Mr. Bohnenstiel's office in relationship to your office?

A. It's on another floor, the second floor on the Bransford Avenue side of the building.

Q. Okay. Have you ever had any training in enforcing the discrimination laws?

A. Yes.

Q. Who gave you that training?

A. It was when I was with the Franklin Special School District. I don't know. I can't remember who it was brought in by, our HR Department.

Q. Have you ever had anything like that at Metro?

A. No.

Q. Did you know that it's against the law to retaliate against someone for exercising rights under the discrimination laws?

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A. Yes.

Q. Okay. And did you know that when you were at Franklin?

A. Yes.

Q. Now, if you had one of your employees claim that a supervisor had sexually harassed them for whatever reason and it was -- the complaint was found to have some merit to it, would you watch any action that supervisor takes against that employee?

A. Yes.

MR. YOUNG: I object to the hypothetical nature of that question. Go ahead and answer.

MS. STEINER: He did. Did you get that, Max?

THE REPORTER: (Nodded head affirmatively.)

BY MS. STEINER:

Q. And would you feel that it would be one of your job duties to put up some sort of a -- some sort of a protection to make sure that that supervisor isn't allowed to retaliate against the employee?

MR. YOUNG: I object to the hypothetical nature of that question and the vagueness of it.

BY MS. STEINER:

Q. Answer.

THE WITNESS: Am I supposed to answer?

MR. YOUNG: Yeah, if you can.

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THE WITNESS: It would depend on whether the supervisor was under my jurisdiction or someone else's jurisdiction, but ultimately I would expect the Human Resources procedures and processes that were in place, we would follow those.

BY MS. STEINER:

Q. Okay. If the supervisor was under your authority, would you put some sort of safeguards in place to make sure that that supervisor doesn't retaliate against the employee?

MR. YOUNG: Same objection. Go ahead and answer it, if you can.

THE WITNESS: That would make sense.

BY MS. STEINER:

Q. Okay. So that's a yes?

A. Yes.

* * *

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* * *

Q. Okay. Now, did you know that Diane Proffitt was approached by Veronica Frazier about Gene Hughes?

A. I don't know who Veronica Frazier is.

Q. Did you know that the Human Resources Department at Metro approached Ms. Crawford about Gene Hughes?

A. Not until I got the report you gave me a copy of, no.

Q. Is that something that should have been brought to your attention when it was going on?

A. Like I said earlier, if it were an on-going investigation when I got here I would expect her immediate supervisor to be aware of it, but I wouldn't expect necessarily that I would.

Q. And when did you start with Metro?

A. July 1, 2002.

Q. And who did you replace?

A. John Dietz.

Q. And did you have any sort of meeting with Mr. Dietz to discuss what was on-going?

A. Yeah.

Q. Okay. And did he explain to you the important

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areas that -- that you would have to jump into and work on?

A. Yes.

Q. Okay. And did he tell you anything about any sort of investigation of Hughes?

A. No.

Q. Where is Mr. Dietz today?

A. He moved to Michigan.

* * *

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* * *

Q. Now, it's my understanding that your Payroll Department was audited sometime in the Fall of 2002?

A. All of our finances are audited on an annual basis, required by state law.

Q. Okay. Did you have any special audit performed in the Fall of 2002?

A. I didn't.

Q. Do you know of anyone that did order a special audit of one of your departments in 2002, the fall?

A. I know that Metro Internal Audit requested some additional assistance in the audit -- annual audit in the Fall of 2002.

Q. Okay. And is that when they hired KPMG?

A. No. KPMG are the -- are the external auditors that are under contract with Metro Government to perform that annual audit.

Q. Okay. And was anyone specially hired to perform an

[p. 44]

audit in the Fall of 2002?

A. As I said, I know Metro Internal Audit requested some additional assistance from KPMG in that audit.

Q. And do you know why they requested that?

A. I assume based on findings of the auditors.

Q. Do you know what those findings were?

A. The operational irregularities in the Payroll Department.

Q. Do you know who -- whether or not one individual made the complaint that there were operational irregularities in the Payroll Department?

A. One individual?

Q. Uh-huh.

A. No.

Q. Do you know who made the complaint that there were operational irregularities in the Payroll Department?

A. There were some issues that were brought to my attention that I relayed on to our external auditors that were already out here as part of the annual audit.

Q. Okay. And the problems that were brought to your attention, who brought those to your attention?

A. The three employees in the Payroll Department, other than Ms. Crawford.

Q. Okay. Now, were you aware of Veronica Burns -- Veronica Frazier -- excuse me, Veronica Frazier and the

[p. 45]

Human Resources Department requesting an audit of your Payroll Department?

A. No, I don't -- I don't know who you said. I think you said Veronica Frazier was with Metro HR. But no, I was not.

Q. Okay. Were you aware of complaints brought to Kim McDoniel in the Finance/Auditing Department of Metro about your Payroll Department?

A. Only those that were brought through the external auditors, KPMG.

Q. And what was brought through the external auditors?

A. Certain employees -- well, employees not -- their garnishments, for instance, not being paid to the courts. Employees annuity payments not being made to the appropriate companies and vendors.

Q. And meaning the --

MR. YOUNG: Well, were you finished answering that question?

THE WITNESS: No.

BY MS. STEINER:

Q. Go on.

A. 941 IRS forms not being filed timely or accurately. Several were based on telephone calls that had either come into my office or come into Julie Waters' office from either IRS representatives or employees about problems with

[p. 46]

payroll issues.

Q. Okay. Now, the three employees in the department that brought problems to your attention, who were those three employees?

A. Tangie Broughton, B-R-O-U-G-H-T-O-N; Wanda Winton, W-I-N-T-O-N; and Diane Burden.

Q. Okay. And did you keep any sort of written documentation of their complaints?

A. No.

Q. Now, what I want to know is this, besides these three employees complaining, did you receive complaints from any other department in Metro about irregularities in your Payroll Department?

A. No.

Q. So the only complaints that you knew about something being irregular in that department was from these three employees?

MR. YOUNG: I object to the form of that question. Go ahead and answer it, if you can.

THE WITNESS: You what?

MR. YOUNG: I object to the form of the question.

THE WITNESS: No, those were the only three.

BY MS. STEINER:

Q. Okay.

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A. And I relayed that information to the auditors.

Q. Did these three employees, did someone tell them to come to you with their complaints?

A. Not that I know of.

Q. Do you know whether or not any other investigation was on-going at the same time or complaints being made to other departments at Metro about your Payroll Department?

A. No.

Q. Do you know whether or not Gene Hughes made any complaints about irregularities in the Payroll Department?

A. I think the auditors indicated that they had talked to him and that he had some issues.

Q. And do you know whether or not Dr. Hughes' issues arose -- he told the auditors of his issues before or after these three employees came to your office?

A. I don't know when he talked to the auditors or when they talked to him.

Q. Do you know when these three employees came to your office?

A. I think it was the first part of September 2002, because the auditors were still out here with the external audit that was going on.

Q. Does Dr. Gene Hughes have any -- did he have any oversight over the Payroll Department?

A. No.

* * *

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* * *

Q. Do you know what financial procedures were questionable?

A. Most of which were outlined in the charge letter.

Q. Now, did you know when you suspended Ms. Crawford that she had gone to Human Resources to state that Gene Hughes had engaged in inappropriate conduct?

A. No.

Q. Did you know in her disciplinary hearing that she had gone to Human Resources to complain about Gene Hughes?

A. No.

Q. I believe earlier you testified that you first got a copy of this fact-finding report at her hearing?

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A. At the end of her hearing. You gave me a copy of it, correct.

Q. Okay. And that would have been the first hearing; is that correct?

A. That would have been the only hearing.

Q. There was one hearing in your office and then there was one up in Dr. Garcia's office; is that correct?

A. Yes. Departmental hearing in my office.

Q. And that was to determine whether or not she should be fired; is that correct?

A. No. That was an opportunity to -- to give her an opportunity to respond to the charges in the charge letter.

Q. Okay. Now, when you were provided a copy of the fact-finding report, did you question anyone at Metro to find out whether or not her participation in this had had any impact on the investigation?

A. No.

Q. Did you contact anyone from Human Resources to ask exactly what was going on with this investigation of Gene Hughes?

A. No.

Q. Did you ask anyone about whether or not Gene Hughes had any input into making the initial complaint against Ms. Crawford?

A. No. The actions that I took against Ms. Crawford

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were totally separate from anything in this report or any of these situations.

Q. Did you speak with Dr. Garcia and tell Dr. Garcia that Ms. Crawford thinks she's being retaliated against?

A. Yes.

Q. Okay. And did you tell him that she thinks she's being retaliated against because she spoke to Human Resources against Dr. Hughes?

A. Yeah. I basically just reiterated what you had said at the departmental hearing about how this was a retaliation against Ms. Crawford. So I told him what you said.

Q. And what did Dr. Garcia reply?

A. He didn't reply.

Q. Did he ask you to investigate or to turn over to Human Resources her allegation that she was being retaliated against?

A. No.

Q. Okay. If someone in your department claims that they are being discriminated against, is that something that you would send them to Human Resources about?

A. Yes.

Q. And Human Resources should investigate it; is that correct?

A. Yes.

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Q. Okay. It's the same thing if someone thinks they're being retaliated against; is that correct?

A. Yes.

Q. Do you know whether or not anyone from Metro ever investigated Ms. Crawford's claim of retaliation?

A. I don't know.

Q. Okay.

A. And again, the actions I took were from -- were separate from this.

Q. May I have a copy of this letter. I don't want to make it an exhibit. (Document passed.)

Was anyone else disciplined as a resulted of the KPMG investigation, other than Ms. Crawford?

A. Mr. Bohnenstiel as part of our joint decision for him to resign.

Q. Did he keep full retirement benefits?

A. I have no idea.

Q. Was he found to be equally at fault with Ms. Crawford?

A. I don't know what you mean.

Q. Who made the decision that Mr. Bohnenstiel could resign but Ms. Crawford would be terminated?

A. He and I came to a joint decision that that's what would be best for both him and the district.

Q. Why was a decision not made to confront Ms.

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Crawford to see if she would resign?

A. Because I felt that the most appropriate action in that case was termination.

* * *

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REPORTER'S CERTIFICATE

STATE OF TENNESSEE

COUNTY OF DAVIDSON

I, Roy M. Curry, Jr., court reporter, with offices in Nashville, Tennessee, hereby certify that I reported the foregoing deposition of **CHRISTOPHER MASON**

HENSON by machine shorthand to the best of my skills and abilities, and thereafter the same was reduced to typewritten form by me.

I further certify that I am not related to any of the parties named herein, nor their counsel, and have no interest, financial or otherwise, in the outcome of the proceedings.

/s/_____
ROY M. CURRY, JR., B.C. R., RPR, CRI, CCR
Bachelor's Degree of Court Reporting,
Registered Professional Reporter
Certified Reporting Instructor,
Certified Court Reporter, and
Notary Public State of Tennessee At Large

My Commission Expires: 3/27/2005

IN RE: VICKY S. CRAWFORD

Thursday, February 6, 2003

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Also Present:
Ms. Vicky S. Crawford
Dr. Pedro Garcia
Mr. Chris M. Henson
Mr. Charles W. Cagle
Mr. Kerry Pogue (paralegal)

Reported By:
Cheryl Buckelew Smith

* * *

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* * *

Q. Who contacted you?

A. Metro Human Resources.

Q. And what was the name of the individual, who was it?

A. Veronica Frazier I believe. The best I remember was Veronica Frazier.

Q. What did she inquire of you?

A. She said that she had been asked by

[p. 173]

Dr. Garcia to look into a matter and she questioned me, the different types of people that I had in contact during my regular course of my employment, where my office was located, if I had any contact with Dr. Hughes and in what capacity, did we have as far as a working relationship versus just a casual type of knowledge of each other.

Q. And what type of relationship did you have with Dr. Hughes?

A. We did have -- there was the sick-leave bank where his office and the payroll office would have to work jointly together in degerming the eligibility of the employees at which time I would either work with him

or with his secretary. But after a period of time I refused to have any dealings with Dr. Hughes' office at all.

Q. And why was that?

A. Because of the sexual harassment that he did to me.

Q. Did you tell this individual who contacted you about this?

A. Yes, I did.

Q. What did you tell her that Dr. Hughes had said?

A. He would grab himself and would grab his

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crotch and would also make reference to me giving him head. He would ask to see my breasts. He also grabbed my head to his crotch in my office.

Q. How did you feel about that?

A. Degrading, violated.

Q. When did you tell this person about this?

A. At the time that they questioned me.

Q. Do you recall the exact month?

A. It had to be June, shortly after the month of May because I was in the hospital. This happened right after I got out of the hospital. In the month of May is when he pulled my head to his crotch while I was sitting at my desk so this came after. It had to be June or July.

Q. Now, after you informed this person of what you knew about Dr. Hughes did you ever receive any input back about that investigation?

A. No. I was told to avoid -- I was told by Veronica, she advised me to avoid all contact with Dr. Hughes in any shape, form, or fashion, and that if anybody questioned the reason why I was to tell them to contact them.

Q. Why didn't you go to someone about these complaints?

A. Dr. Hughes is in charge of the department

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that handles these complaints. My supervisor, Mr. Bohnenstiel, I didn't go to him because I just felt like he was a space cadet, that he didn't care. He wouldn't understand. I did go to him on October the 14th and told him that day in regards to what had happened.

* * *

REPORTER'S CERTIFICATE

STATE OF TENNESSEE)

COUNTY OF WILSON)

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I FURTHER CERTIFY that I am not related to any of the parties named herein, nor their counsel, and have no interest, financial or otherwise, in the outcome or events of this action.

IN WITNESS WHEREOF, I have hereunto affixed my official signature and seal of office this 24th day of February, 2003.

/s/_____
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My Commission Expires:

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No. 06-1595

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In the Supreme Court of the United States

VICKY S. CRAWFORD,
Petitioner,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Does the anti-retaliation provision of section 704(a) of Title VII of the 1964 Civil Rights Act protect a worker from being dismissed because she cooperated with her employer's internal investigation of sexual harassment?

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OPINIONS BELOW

The November 14, 2006, opinion of the court of appeals is reported at 211 Fed. Appx. 373 (6th Cir. 2006), and is set out at pp. 3a-10a of the Petition Appendix. The March 1, 2007, order of the court of appeals denying rehearing, which is not officially reported, is set out at pp. 1a-2a of the Petition Appendix. The January 6, 2005, opinion of the district court, which is not officially reported, is set out at pp. 12a-17a of the Petition Appendix.

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on November 14, 2006. A timely petition for rehearing and suggestion for rehearing en banc was denied on March 1, 2007. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 704(a)[1] of Title VII, 42 U.S.C. § 2000e-3(a), provides in pertinent part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his

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[1] The language of section 704(a) adopted by Congress uses the phrase "under this title." When Title VII was codified in the United States Code, what had been Title VII of the 1964 Civil Rights Act became subchapter vi of chapter 21 of 42 U.S.C. Accordingly, the codifiers reworded section 704(a), substituting the phrase "under this subchapter." For clarity we use the phrasing "under this title" actually enacted by Congress.

> employees . . . because he has opposed any practice, made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

STATEMENT OF THE CASE

This action arose out of a sexual harassment investigation conducted in 2002 by the Metropolitan Government of Nashville and Davidson County, Tennessee, referred to collectively by the courts below as "Metro." In the spring of 2002, an attorney at the Metro Legal Department learned that several women employees had expressed concern about sexual harassment by the employee relations director for the Metro School District, Dr. Gene Hughes.[2] Hughes was one of the highest ranking officials in the school district.

The investigation of this report of sexual harassment was assigned to Veronica Frazier, the Assistant Director for the Metro (i.e. county) human resources department, an office separate from the school district personnel office headed by Hughes. One of those interviewed by Frazier was petitioner Crawford, a thirty-year employee of the school district who had been the district's payroll coordinator since 1978. In the course of those interviews, three women

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[2] Crawford explained that she had not complained about the sexual harassment by Hughes because Hughes himself was "in charge of the office that . . . [I] would normally go to, employee relations." Crawford Dep., p. 15; JA 20.

employees, including petitioner Crawford, described serious acts of sexual harassment by Hughes. (Pet. App. 4a-5a).

"Crawford told the investigators that Hughes had sexually harassed her and other employees."[3] Crawford reported that "on numerous occasions" Hughes "would come to my window and ask to see -- he would say, 'Let me see your titties.'" He "always" would "grab his crotch and state 'you know what's up,'" and "there was times" Hughes "would approach her window and put his crotch up to the window." On one occasion "Hughes came into her office and she asked him what she could do for him and he grabbed her head and pulled it to his crotch." Crawford made clear that she had strongly objected to this behavior, telling "him to get the hell out of my office."[4] Crawford also told the investigators that "Hughes [had] sexually harassed . . . other employees." (JA 12). Crawford characterized her statements to the investigators as "testimony against" Hughes. (JA 14).[5] Two other women employees also described acts of sexual harassment by Hughes.[6]

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[3] Pet. App. 5a.

[4] Pet. App. 5a n. 1; JA 12, 16-19, 23.

[5] In an affidavit, Crawford explained that in making these statements to the investigators she was "opposing" Hughes' actions, and that at the time of her statements she believed that she was "exercising my rights under Federal law." (JA 12).

[6] Pet. App. 4a-5a; Br. Opp. App 9-13; Proffitt Affidavit, par. 14; Sadler Affidavit, par. 7.

All three of the women who provided information about sexual harassment expressed fears of retaliation, and all three women were indeed fired after they cooperated in the investigation. The Metro investigators themselves reported that one of the women, Dianne Proffitt, "expressed a serious concern about retaliation [for] her participation in the investigation"; she stated that "If my name comes out of this, I won't have a part-time job." (Br. Opp. App. 11). "I . . . told Veronica Frazier that I was very concerned and felt that I would lose my job if I participated in this investigation."[7] Proffitt was dismissed only four days after being interviewed by Frazier.[8]

Tamara Sadler was the employee who had first mentioned the problem of sexual harassment to the Metro attorney, Jennifer Bozeman. When Bozeman later told Sadler that her report had triggered an investigation, Sadler was immediately fearful that she would be dismissed. "I told Jennifer Bozeman that I didn't like it, . . . that I would end up losing my job over this."[9] Bozeman assured Sadler that she would not be fired. Sadler was removed from her position

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[7] Proffitt Affidavit, par. 13.

[8] Proffitt Affidavit, par. 13 (interviewed on June 24, 2002), 20 (dismissed on June 28, 2002); Br. Opp. App. 11 (Proffitt was fired "mid-investigation, shortly after the interview" by the investigators.")

[9] Sadler Affidavit, par. 6.

only minutes after she obtained a copy of the report of the results of the Metro investigation.[10]

Crawford too was afraid that she would be fired for having cooperated with the investigation. She was particularly concerned because Hughes was "very good friends" with the School District Director. "I felt like if I testified against [Hughes] that I would lose my job."[11] The investigators were aware of the witnesses' concerns, and reported that in addition to Sadler "two of the [other] witnesses were especially fearful about losing their jobs. The witnesses' apprehension about participating in this investigation was greater than Fact finders would reasonably expect." (Br. Opp. App. 17). On September 13, 2002, the same day that Metro released the report on the sexual harassment allegations that had been made by Crawford and others, Metro officials commenced a formal investigation of Crawford.[12] Crawford was suspended in November 2002 and ultimately dismissed in January 2003. (Pet. App. 5a).

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[10] Sadler Affidavit, paragraphs 10-11 ("I went to [School District Director] Pedro Garcia's office to get my copy of the report. I was mortified to see my name on the front page of the report as being one of the individuals interviewed by Veronica Frazier .... I left Pedro Garcia's office and walked back to my office. When I arrived in my office Julie Williams, Assistant Superintendent of Human Resources was waiting for me and placed me immediately on administrative leave.")

[11] Crawford Dep., p. 21, JA 23.

[12] Br. Opp. App. 18-19; Frazier Dep., pp. 68-69.

The report prepared by the investigators did not resolve the merits of the sexual harassment allegations. Instead, that report repeatedly recited that "Fact finders could not confirm the complainant's statements. Dr. Hughes denies such behavior and there are no witnesses to corroborate the witness' claim." (Br. Opp. App. 15-16). Despite statements from three different women describing sexual harassment by Hughes, the investigators explained that they were unwilling to make any findings about Hughes' actions because each of the victims was alone with Hughes at the time of the alleged harassment. Hughes' denial of each allegation of harassment was apparently enough by itself to preclude any finding of harassment. (Br. Opp. App. 15)("Fact finders could not confirm the witness' allegations where conversation included sexual references, since Dr. Hughes denied any use of sexual references.").[13] The investigators concluded that Hughes had acted improperly in some respects, but no disciplinary action was taken against him. (Pet. App. 5a).

After filing a timely charge with the EEOC, Crawford commenced this action under Title VII in the United States District Court for the Middle District of

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[13] See Frazier Dep., pp. 80-81, JA 48:

Q. What about the witness that claimed Dr. Hughes entered her office and pulled the witness' head into his crotch, could that constitute sexual harassment?

A. Yeah, we never could corroborate that.

Q. Meaning, you only had one witness?

A. Correct.

Q. And Dr. Hughes denied it?

A. Right. We had no one else who had seen that.

Tennessee. Crawford alleged that she had been dismissed in retaliation for having told investigators about being sexually harassed by Hughes. That retaliation, she asserted, violated section 704(a) of Title VII.

The District Court dismissed the complaint, holding that section 704(a) permits an employer to retaliate against an employee because she had cooperated with that employer's own internal investigation of sexual harassment. To be covered by section 704(a), the District Court reasoned, a sexual harassment victim must on her own initiative file some sort of complaint. Once an employer initiates an investigation, the court held, mere witnesses--even witnesses who report having been sexually harassed--are outside the protections of section 704(a). (Pet. App. 15a-16a).[14]

The Court of Appeals for the Sixth Circuit affirmed. It held, first, that complaining about sexual

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[14] [P]rotected activity under Title VII does not include participation in internal investigations. . . . In the cases relied upon by Plaintiff . . . the plaintiffs initiated investigations by filing complaints or reporting allegedly unlawful conduct. Here, Plaintiff merely answered questions by investigators in an already-pending internal investigation, initiated by someone else. In her Complaint, Plaintiff alleges that she fully cooperated with Metro's investigation, that she participated in the investigation, that she was questioned by investigators, that she testified unfavorably to Dr. Hughes. There is no allegation that she instigated or initiated any complaint. (Pet. App. 15a-16a).

harassment in the course of an employer's internal investigation is not protected by the participation clause of section 704(a), which forbids retaliation because an employee "testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title." The participation clause, the Sixth Circuit reasoned, does not apply until and unless the victim or someone else has formally filed a charge with the EEOC. (Pet. App. 8a-9a).[15] Second, the Court of Appeals held that complaining about sexual harassment in response to an internal investigation is not protected by the opposition clause of section 704(a), which forbids retaliation because an employee "has opposed" a violation of Title VII. (Pet. App. 7a-8a).[16] Opposition to

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[15] Crawford's participation in an internal investigation initiated by Metro in the absence of any pending EEOC charge is not protected activity under the participation clause. We have held that "Title VII protects an employee's participation in an employer's internal investigation into allegations of unlawful discrimination where that investigation occurs pursuant to a pending EEOC charge." *Abbott* [*v. Crown Motor Co., Inc.*], 348 F. 3d [537,] 543 [(6th Cir. 2003)]. In Crawford's case, however, no EEOC charge had been filed at the time of the investigation or prior to her firing; the investigation was internal and was prompted by an informal internal statement.

(Pet. App. 8a).

[16] Crawford's actions do not constitute opposition under the meaning of the opposition clause. The general idea is that Title VII "demands active, consistent 'opposing' activities to warrant . . . protection against retaliation." *Bell v.*

violations of Title VII, the court insisted, is only protected by the opposition clause if three requirements are met; that opposition must be "active", "consistent" and "overt." (Pet. App. 7a-8a).

SUMMARY OF ARGUMENT

I. In reporting sexual harassment to her employer, Crawford was protected by the participation clause of section 704(a), which prohibits reprisals against an employee because he "participated in any . . . investigation . . . under this title."

The court of appeals erred in holding that a "limit delineated by the language of Title VII" restricts the participation clause to EEOC proceedings. The text of section 704(a) contains no such limit.

Safety Grooving and Grinding, LP, 107 F. App'x 607, 610 (6th Cir. 2004).

> Crawford's actions consisted of cooperating with Metro's investigation into Hughes by appearing for questioning at the request of Frazier and, in response to Frazier's questions, relating unfavorable information about Hughes. Crawford does not claim to have instigated or initiated any complaint prior to her participation in the investigation, nor did she take any further action following the investigation and prior to her firing. This is not the kind of overt opposition that we have held is required for protection under Title VII.

(Pet. App. 7a-8a).

EEOC investigations and other proceedings are provided for in section 706(b) of Title VII. Section 704(a), however, is not limited to investigations or other actions "under section 706(b)", but applies instead to actions "under this title." That broader statutory language is clearly purposeful. Title VII has numerous cross-references, some to subsections, some to sections, and some to the entire Title. The use of the more inclusive language in section 704(a) was thus quite deliberate. When Congress has wanted to limit the protections of anti-retaliation statutes to contacts with particular federal agencies or officials, it repeatedly has done so expressly.

The EEOC's view, as expressed in the Government's amicus brief, is that "[a]n employer-initiated investigation designed to detect or root out discrimination prohibited by Title VII is reasonably construed . . . to be an investigation 'under' the statute." That interpretation of the participation clause reflects "a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Federal Exp. Corp. v. Holowecki*, 128 S.Ct. 1147, 1156 (2008).

In eleven decisions spanning more than a quarter of a century, this Court has emphasized that the creation of employer measures to detect and eliminate discrimination is one of the central purposes of Title VII. In particular, "Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms." *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 764 (1998). This Court has repeatedly interpreted Title VII in light of this statutory purpose. In *Ellerth*, for example, the Court

construed the terms "employer" and "agent" in section 701(b) in a manner intended to encourage employers to establish precisely the type of internal remedial mechanism at issue in the instant case. Similarly, that statutory purpose of encouraging voluntary compliance with Title VII through the creation of internal corrective and preventative mechanisms should inform the interpretation of section 704(a), which is vital to the efficacy of those very mechanisms.

The interpretation of Title VII in *Ellerth* makes the establishment of employer internal procedures for dealing with sexual harassment a practical necessity. "[A]n employer's investigation of a sexual harassment complaint is not a gratuitous or optional undertaking; under federal law, an employer's failure to investigate may allow a jury to impose liability on the employer." *Malik v. Carrier Corp.*, 202 F. 3d 97, 105 (2d Cir. 2000). An employer's investigation of a possible violation of Title VII, as part of an internal procedure whose creation was both a central purpose of Title VII and a necessary step to reduce Tile VII liability, can fairly be characterized as an investigation "under [T]itle [VII]."

II. Crawford's actions were protected as well by the opposition clause of section 704(a), which forbids retaliation against an employee because he or she "opposed any practice" forbidden by Title VII.

An employee's action or statement constitutes opposition if it "would reasonably [be] interpreted as opposition." 2 EEOC Compliance Manual § 8-II(B)(2). A trier of fact could assuredly conclude that Crawford's actions should be construed as opposition. The abusive

conduct which Crawford described was exceptionally offensive; the employer would have known that any woman in Crawford's position would have wanted steps taken to prevent further such incidents. The employer's own investigators characterized Crawford as a "complainant[]" and her statements as an "EEO claim."

The court of appeals improperly engrafted onto the opposition clause several additional requirements not found in the text of the statute.

Nothing in the language of the opposition clause limits its protections to "active" employees who "initiate" a formal complaint. It would make no sense to protect only the individual who initiates a complaint process, and then exclude from the statutory protections the very witnesses whose statements may be essential to determining the merits of the initial allegations.

Similarly, application of the opposition clause is not restricted to employees who "consistent[ly]" engage in repeated acts of opposition. Once a single act of opposition has occurred, the statutory requirement--that the plaintiff have "opposed any practice, made an unlawful employment practice by this title"--has been fully satisfied; the court below erred in holding that "further action" is required.

The text of the opposition clause does not require that the opposition be "overt." The opposition clause protects cautious workers who opt for less confrontational forms of opposition. It would be a perverse interpretation of section 704(a) to hold that

sexual harassment victims lose the statutory protection from retaliation because they have taken prudent steps to avoid retaliation itself.

ARGUMENT

I. PETITIONER'S CONDUCT WAS PROTECTED BY THE PARTICIPATION CLAUSE OF SECTION 704(a)

A. The Protections of the Participation Clause Are Not Limited to Investigations and Hearings by or Proceedings Before the EEOC

Section 704(a) protects an employee from retaliation because "he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title." The court of appeals correctly recognized that

> the purpose of Title VII's participation clause "is to protect access to the machinery available to seek redress for civil rights violations and to protect the operation of that machinery once it has been engaged . . . ."

(Pet. App. 10a, *quoting Booker v. Brown & Williamson Tobacco Co., Inc.*, 879 F. 2d 1304, 1313 (6th Cir. 1989)). The court below erred, however, in holding that a "limit delineated by the language of Title VII" restricts the protections of the participation clause to "EEOC proceedings." (Pet. App. 10a). The text of section 704(a) contains no such "limit."

The participation clause refers broadly to investigations, hearings, and proceedings "under this title", language which covers more than just the activities of the EEOC. The proceedings engaged in by the EEOC--receipt of charges, investigations, determinations, and conciliation--are established by section 706(b) of Title VII. 42 U.S.C. § 2000e-5(b). The participation clause, however, is not limited to participation in investigations, proceedings and hearings "under section 706(b)", but utilizes the broader phrase "under this title." The use of that more inclusive language is clearly purposeful. The text of Title VII contains numerous internal cross-references, some to subsections[17], some to sections[18], and some to the entirety of Title VII.[19] The care with which

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[17] E.g., 42 U.S.C. § 2000e-8(d) ("In prescribing requirements pursuant to subsection (c) of this section, the Commission shall consult with other interested State and Federal agencies").

[18] E.g., 42 U.S.C. § 2000e-5(a)("The Commission is empowered . . . to prevent any person from engaging in any unlawful practices as set forth in sections 703 and 704").

[19] E.g., 42 U.S.C. §§ 2000e-5(k) ("In any action or proceeding under this [title], the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee"), 2000e-7 ("Nothing in this [title] shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any state . . . ."), 2000e-11 ("Nothing contained in this [title] shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans"), 2000e-12(a) ("The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this [title]") The legislation enacted by Congress used the term "title" in each of

Congress framed the scope of these various cross-references makes clear that the particular language used in section 704(a)--"under this title", rather than under some particular section--was quite deliberate. The fact that Congress worded section 704(a) to refer broadly to investigations and proceedings "under this title", rather than more narrowly to such activities "under section 706(b)," precludes any argument that the text of section 704(a) itself limits the participation clause to activities of the EEOC.

The absence of any such textual limitation is confirmed by the fact that the terms "investigation", "hearing", and "proceeding" are not preceded by any limiting adjective restricting their meaning to activities by or connected to the EEOC, or in any other way. For example, unlike section 709(a), which refers narrowly to an "investigation of a charge filed under section 706," section 704(a) refers simply to any "investigation," without any such restrictive language. 42 U.S.C. § 2000e-8(a). Similarly, section 704(a) refers, not to participation in an "EEOC proceeding", but simply to participation in a "proceeding"; elsewhere in Title VII, on the other hand, Congress did qualify the term "proceeding" with just that sort of limiting language.[20] Although section 710 refers to

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these provisions. The word "subchapter" was substituted for "title" when the provisions were codified in 42 U.S.C. See n. 1, supra.

[20] 42 U.S.C. §§ 2000e-5(b)("proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d)"), 2000e-5(c)("proceedings . . . commenced under . . . State or local law"), 2000e-5(d)("criminal proceedings"), 2000e

"hearings . . . conducted by the Commission," section 704(a) applies without such limitation to "hearings." 42 U.S.C. § 2000e-9.

The broad anti-retaliation language of the participation clause stands in clear contrast to the narrow terms of section 714, which is expressly limited to reprisals related to the EEOC. Section 714 applies "to officers, agents, and employees of the Commission," but to no other individuals, the protections of sections 111 and 1114 of the Criminal Code. 18 U.S.C. §§ 111, 1114. Section 111(a)(1), thus extended to EEOC officials, makes it a crime to "forcibly assault[] . . . any person designated in section 1114 . . . on account of the performance of official duties." When Title VII was enacted[21] section 1114, and thus section 714, did not apply to (and thus did not protect) certain Justice Department officials[22] who are responsible for

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5(e)(1)("proceedings with a State or local agency"), 2000e-5(f)(1)("court . . . proceedings"; "State or local proceedings described in subsections (c) or (d)"), 2000e-6(a)("proceedings instituted [by the Attorney General] pursuant to this section"), 2000e-8(d)("proceeding under State or local law").

[21] Section 1114 was expanded in 1996 to apply to all federal officials. See 42 U.S.C. § 1114 (1984); 1996 U.S. Code Cong. and Admin. News 944, 956.

[22] Prior to 1996 section 1114 applied to a United States Attorney, a Assistant United States Attorney and an employee of the Federal Bureau of Investigation, but not to an attorney in the Civil Rights Division. Litigation of Title VII claims by the Department of Justice would ordinarily be handled by attorneys in the Civil Rights Division.

enforcing Title VII[23] or the federal officials who serve on the Equal Employment Opportunity Coordinating Council. 42 U.S.C. § 2000e-14. The protections of section 714 also do not apply to officials of state and local EEO agencies, despite the role of those agencies under Title VII, see 42 U.S.C. §§ 2000e-5(c), 2000e-5(d), 2000e-5(e)(1), 2000e-5(f)(1), to private individuals (such as petitioner) or to an employer's personnel officials.

When Congress has wanted to limit the protection of an anti-retaliation provision to contacts with federal agencies, it has done so expressly. For example, employees of federal military contractors are protected from reprisals for providing information relating to a violation of federal law regarding contracting *only* if they provide that information to a Member of Congress, the Department of Justice, or "an authorized official of an agency." 10 U.S.C. § 2409(a). Because of this narrow language, the same employees under section 2409(a) could be fired for reporting that violation of federal law to their own employers, a company attorney, the local police, an employee of Congress, or for disclosing it in testimony in federal or state court or before a state administrative agency. Several other federal anti-retaliation laws have similar agency-specific restrictions.[24]

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[23] See 42 U.S.C. §§ 2000e-5(proceedings against state and local governments), 2000e-6(pattern or practice actions, prior to 1974).

[24] 12 U.S.C. §§ 1441a(q)(1)(forbidding retaliation for disclosure of information regarding certain violations of federal law to the Thrift Depositor Protection Oversight Board, the Resolution Trust Corporation, the Attorney General, or a federal banking agency);

This Court has recognized the practical importance of "a broad interpretation of the anti-retaliation provision [in Title VII]." *Burlington Northern & Santa Fe Rwy. Co. v. White*, 548 U.S. 53, ---, 126 S.Ct. 2405, 2413 (2006); see *N.L.R.B. v. Scrivener*, 405 U.S. 117, 124 (1972)(construction of the anti-retaliation provision of the NLRA "generally has been a liberal one in order fully to effectuate the section's remedial purpose"). The terms of the participation clause itself manifest a congressional determination that the protections of that clause be broad. Rather than limit (as do some federal anti-retaliation statutes) protections to those who engage in a particular *type* of participation (e.g., providing information), section 704(a) in sweeping language applies to all activities connected to a covered proceeding; the employee is

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1831j(forbidding retaliation for disclosure of information regarding certain violations of federal law to the Attorney General or any federal banking agency); 31 U.S.C. § 5328(a)(forbidding retaliation for disclosure of information regarding certain violations of federal law to the Attorney General, the Secretary of the Treasury, or any federal supervising agency); 41 U.S.C. § 265(a)(forbidding retaliation for disclosure of information regarding certain violations of federal law to Members of Congress, the Department of Justice, or authorized officials of an executive agency); 42 U.S.C. § 5851(a)(1)(c)(forbidding retaliation for certain testimony if made before Congress or in a federal or state proceeding); 46 U.S.C. § 2114(a)(forbidding retaliation for disclosure of information regarding certain violations of federal law to the Coast Guard or other appropriate federal agency); 50 U.S.C. § 2702(a)(forbidding retaliation for disclosure of information about violations of federal law or other improprieties to certain Members of Congress, certain congressional staff members, the Federal Bureau of Investigation, or the Inspector General of the Department of Energy).

protected from retaliation because he or she "made a charge, testified, assisted, or participated *in any manner*." (Emphasis added). The phrase "under this title" should be construed in a manner consistent with the intent to provide broad coverage manifested in the "in any manner" clause.

B. Participation in An Employer's Internal Investigation or Proceeding Regarding Gender-Based Discrimination Is Protected By the Participation Clause

An employer's internal investigation, hearing, or other proceeding directed at preventing or correcting conduct violative of Title VII[25] is action "under this title" within the meaning of section 704(a). The EEOC's view, as expressed in the Government's *amicus* brief, is that "[a]n employer-initiated investigation designed to detect or root out discrimination prohibited by Title VII is reasonably construed . . . to be an investigation 'under' the statute." Brief for the United States as Amicus Curiae, pp. 10-11. That interpretation of the participation clause reflects "a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Federal Exp. Corp. v. Holowecki*, 128 S.Ct. 1147, 1156 (2008)(*quoting*

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[25] An investigation, hearing or proceeding by the EEOC would not be an activity "under this title" if the subject matter had nothing to do with Title VII, e.g., if the Commission were to conduct an investigation of violations of federal election law. Similarly, the utilization of an employer's internal processes is only action "under this title" if the subject matter of that activity would fall within the Title VII subject matter jurisdiction of the EEOC.

Bragdon v. Abbott, 524 U.S. 624, 642 (1998) and *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944)); see *id.* at 1158 ("Where ambiguities in statutory analysis and application are present, the agency may choose among reasonable alternatives.")

In *Burlington Northern* this Court characterized an employer's own internal processes to detect, prevent and correct discrimination[26] as among the "Title VII[] remedial mechanisms." The plaintiff in *Burlington Northern* had initiated an internal proceeding by filing a sexual harassment complaint with railroad officials; in retaliation for that complaint, the plaintiff was reassigned to more arduous duties. In sustaining the plaintiff's retaliation claim, the Court explained:

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[26] The text of Title VII reflects Congress's understanding that employers seeking to comply with Title VII would have to deal with supervisors or other employees who engaged in unlawful discrimination. Section 705(g)(4) authorizes the EEOC to provide assistance to "any employer, whose employees or some of them . . . refuse or threaten to refuse to cooperate in effectuating the provisions of this title." 42 U.S.C. § 2000e-4(g)(1). A supervisor who actually violates Title VII, such as by engaging in sexual harassment, certainly is "refus[ing] . . . to cooperate in effectuating . . . [T]itle [VII]." The EEOC is also authorized to aid employers by providing "technical assistance" and by engaging in "educational and promotional activities." 42 U.S.C. §§ 2000e-4(g)(3), 2000e-4(h)(1). It was manifestly impractical for Congress to mandate in Title VII a specific form of internal process that all employers would be required to adopt. Instead, Title VII seeks to bring about those processes by providing substantial incentives for employers to fashion mechanisms appropriate to their particular circumstances, and by proffering the assistance of the EEOC to employers in doing so.

> The anti-retaliation provision seeks to prevent employer interference with "unfettered access" to Title VII's remedial mechanisms. *Robinson* [*v. Shell Oil Co.*, 519 U.S. 337,] 346 [(1997)]. It does so by prohibiting employer actions that are likely "to deter victims of discrimination from complaining to the EEOC," the courts, and *their employers*. *Ibid.*

548 U.S. at ---, 126 S.Ct. at 2415 (emphasis added); see 548 U.S. at ---, 126 S.Ct. at 2412 (narrow construction of section 704(a) "would fail to fully achieve the anti-retaliation provision's 'primary purpose,' namely, '[m]aintaining unfettered access to statutory remedial mechanisms.'")(*quoting Robinson*). An investigation, hearing, or other proceeding that is part of such a "Title VII[] remedial mechanism" is an investigation, hearing, or proceeding "under this title."

In eleven decisions[27] spanning more than a quarter

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[27] In addition to the cases cited in the text, see *Pennsylvania State Police v. Suders*, 542 U.S. 129, 145 (2004)(*quoting Ellerth*); *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 545 (1999)(*quoting Ellerth*); *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998)("It would . . . implement clear statutory policy and complement the Government's Title VII enforcement efforts to recognize the employer's affirmative obligation to prevent violations and give credit here to employers who make reasonable efforts to discharge their duty."); *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 358 (1995)(*quoting Albemarle*); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 264-65 (1989)(*quoting Albemarle*); *Local Number 93, International Association of Firefighters, AFL-CIO v. Cleveland*, 478 U.S. 501, 517 (1986)(*quoting Albemarle*); *Owen v. City of Independence*, 445 U.S. 622, 652 n. 35 (1980); *United Steelworkers of America, AFL-CIO,*

of a century, this Court has emphasized that the creation of employer corrective mechanisms is one of the central purposes of Title VII.[28] In *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), the Court explained that the "primary objective" of Title VII is to end discrimination through voluntary compliance, and that the availability of backpay awards furthers that objective by encouraging employers to act on their own to detect and correct violations.

> It is the reasonably certain prospect of a backpay award that "provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in the country's history." *United States v. N.I. Industries*, 479 F. 2d 354, 379 ([8th Cir.] 1973).

422 U.S. at 417-18. In particular, "Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms." *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742,

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v. Weber, 443 U.S. 193, 204 (1979)(*quoting Albemarle*); *International Brotherhood of Teamsters v. U.S.*, 431 U.S. 324, 364 (1977)(*quoting Albemarle*).

[28] Congress contemplated that Title VII would be implemented, not solely or even primarily by court order or agency action, but by "creat[ing] an atmosphere conducive to . . . voluntary . . . resolution of . . . discrimination." H.R.Rep. No. 914, 88th Cong., 1st Sess., pt. 1, p. 18 (1963), 1964 U.S. Code Cong. and Admin. News pp. 2355, 2393.

764 (1998). The proceedings and investigation at issue in this case were part of just such a mechanism.

This central statutory purpose has repeatedly shaped this Court's interpretation of Title VII. In both *Albemarle* and *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 358 (1995), this Court construed the backpay provision of section 706(g)(1) in a manner intended to assure the existence of a powerful incentive for employers to solve discrimination problems on their own initiative. 42 U.S.C. § 2000e-5(g)(1). In *Ellerth* and *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998), this Court interpreted the terms "employer" and "agent" in section 701(b) in a manner intended to encourage employers to establish precisely the type of internal remedial mechanism at issue in the instant case. 42 U.S.C. § 2000e(b). *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 546 (1999), relied on that same purpose in construing section 102 of the 1991 Civil Rights Act, which authorizes awards of punitive damages for certain violations of Title VII.[29] 42 U.S.C. § 1981a(b)(1). A fortiori that statutory purpose of encouraging voluntary compliance with Title VII through the creation of such internal mechanisms should inform the interpretation of section 704(a), which will at times be vital to the efficacy of those very mechanisms.

An employer's internal policies and practices for preventing and correcting unlawful sexual harassment

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[29] Under *Kolstad* an employer's "good faith efforts to enforce an antidiscrimination policy" may defeat a claim for punitive damages. 527 U.S. at 546.

can with particular justification be characterized as "under this title" because those policies and practices were largely created in response to Title VII.[30] Prior to the enactment of Title VII, few employers had prohibitions against or procedures for dealing with sexual harassment. In 1980, when the EEOC first promulgated regulations dealing with sexual harassment, the Commission expressly admonished employers to establish internal procedures for dealing with harassment. 29 C.F.R. § 1604.11(f); see *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998). This Court's 1998 decisions in *Ellerth* and *Faragher* had the salutary effect of prompting large numbers of employers to adopt or strengthen procedures for investigating, detecting, preventing, and correcting sexual harassment.[31] In the wake of those decisions,

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[30] The lead investigator, Veronica Frazier, explained that when the Report used the phrase "sexual harassment" it was referring to conduct forbidden by "federal laws", specifically "Title 7, 1964 Civil Rights Act." (Frazier Dep., p. 79, JA 47).

Metro's current policies regarding sexual harassment expressly refer both to Title VII and to the 1980 EEOC Guidelines on Discrimination Because of Sex, see 29 C.F.R. § 1604.11. http://www.nashville.gov/civil_service/civil_service_policies.pdf (Policy No. 3.1-1 (B)(3)) (visited April 2, 2008), and http://www.nashville.gov/images/gifs/mc/EXECUTIVE_ORDERS/dean_exec_order_008_attach_A.pdf (Attachment A, part (B)(3)) (visited April 2, 2008).

[31] Brief of the Chamber of Commerce of the United States as Amicus Curiae, p. *2, *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004)(No. 03-95)("As a direct result of the incentives crafted by this Court in *Faragher* and *Ellerth* . . . , employers have made great strides in . . . establishing user-friendly, effective internal complaint procedures, and vigorously investigating

business organizations[32] and attorneys[33] have openly

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complaints of sexual and other harassment in the workplace.")

Brief of the Equal Employment Advisory Council and the Chamber of Commerce of the United States as *Amici Curiae*, *Walton v. Johnson & Johnson Services, Inc.*, 347 F. 3d 1272 (11th Cir. 2003)(No. 02-12520-JJ) p. 13("the Court's projection in *Faragher* and *Ellerth* that rejecting strict liability for employers under Title VII for workplace harassment would encourage employers to develop effective procedures to detect and respond to workplace harassment has proven true. A 2001 workplace survey of over 200 human resource executives conducted by a national law firm found that 82% of the respondents provided sexual harassment prevention training for their supervisors, a sharp increase from the 34% that provided this type of training in 1985.")

Wiggin and Dana, Employee Benefits Advisory, Winter 2001, Avoiding Liability in Sexual Harassment Claims ("As many employers know, under Supreme Court rulings, an employer may avoid liability in a sexual harassment case by establishing . . . the Ellerth-Faragher affirmative defense, [which] is dependent upon the practice and policies an employer has in place prior to a claim being brought.") http:/www.wiggin.com/pubs/advisories_template.asp?GroupName=Employee+Benefits&ID=101521132002

[32] National Restaurant Association, *It's Your Move: Stop Sexual Harassment Before It Degrades Your Restaurant* (January 1999)("two recent Supreme court decisions have made institution [of a company policy against sexual harassment] 'mandatory now,' according to Peter Kilgore, legal counsel for the National Restaurant Association"; "[t]he third key component of an effective sexual-harassment policy is establishing procedures for handling complaints.") http://www.restaurant.org/rusa/magArticle.cfm?ArticleID=421 (visited November 6, 2007).

National Association of Realtors, *Legal Update: Sexual Harassment* (under *Faragher* and *Ellerth* a realtor's "liability in a lawsuit for sexual harassment by a supervisor . . . [will] turn on

what preventative and corrective measures you take on a daily, regular basis--long before an incident of sexual harassment may occur. . . . In a lawsuit, adherence to a regular, thorough process will support your [firm's] defense that it has taken corrective measures against sexual harassment. . . . Develop an effective complaint procedure.")(emphasis omitted). https://www.realtor.org/eomag.nsf/pages/Legal_Update_SexualNARs_L?OpenDocument (visited November 6, 2007).

Personnel Policy Service, Inc., *Making Your Harassment Policy Work* ("all employers should have a harassment policy . . . [t]o prevent liability. Court decisions and guidances from the Equal Employment Opportunity Commission (EEOC) consistently show that you can decrease your liability for hostile work environment harassment . . . by maintaining and enforcing internal policies to prevent and deal with harassment"; "[a]lthough the Supreme Court [in *Faragher* and *Ellerth*] did not spell out specifically what makes a policy and complaint procedure effective, HR experts agree that the policy should include . . . **[a] viable complaint and resolution procedure**. This procedure should . . . provide for an investigative process.") http://www.ppspublishers.com/articles/workable_harassment_policy.htm (visited November 6, 2007)(emphasis in original).

[33] Mayer Brown explained to employers that "*Ellerth* and *Faragher* make it imperative" to make sure they have "effective sexual harassment policies in place." "[T]o minimize liability" employers should "mak[e] sure that there is an open and effective system for making, investigating, and resolving complaints," including "adequate procedures . . . to investigate and take appropriate action regarding allegations of sexual harassment." http://mayerbrown.com/publications/article.asp?id=244&nid=6 (visited November 6, 2007).

Covington and Burling issued an analysis which concluded that "*Faragher* and *Burlington Industries* underscore the need for employers to have a clear and well-communicated policy against sexual harassment [and] an appropriate internal complaint

admonished employers to fashion or improve their internal procedures for dealing with sexual harassment in order to minimize their legal exposure. The EEOC has assisted the fashioning of employer procedures by issuing a detailed Policy Guidance[34], on

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process." *The Supreme Court and Sexual Harassment: New Rules of Liability*, available at http://www.cov.com/files/Publiction/140cc16b-2385-4c19-abeb-bb83a3a88130/Presentation/Publication/Attachment/50a71937-de68-4773 (visited April 2, 2008).

Greenberg Traurig admonished that "*Ellerth* and *Faragher* . . . make it important for all employers to . . . take preventative measures to avoid liability. [A]s soon as employees complain of misconduct, employers must take quick steps to investigate and stop any misconduct." http://www.gtlaw.com/pub/ALERTS/1998/sexual98.htm (visited November 6, 2007).

Morris, Manning & Martin warned that *Faragher* and *Ellerth* required "at an absolute minimum" a policy that provides "clear avenues for employees to register complaints of sexual harassment." "In view of these new rules," it concluded, employers should "[e]stablish[] and apply[] uniform procedures mandating a thorough and objective investigation of any complaint or alleged instance of harassment or discrimination." http://www.mmmlaw.com/../publications/article_detail.asp?serviceid=9&articleid=80 (visited November 6, 2007).

Wiggin and Dana advised employers that, in order to establish the *Faragher-Ellerth* affirmative defense, they must have an "effective policy" for dealing with harassment which should, "as a minimum . . . set forth a clear reporting procedure , and encourage reporting." http://wiggin.com/pubs/advisories_templace.asp?GroupName=Employee+Benefits&ID=101521132003 (visited November 6, 2007).

[34] *Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors*, available at http://www.eeoc.gov/policy/docs/harassment.html

which employers and courts alike have relied[35], regarding how to structure an effective internal employer mechanism. "[A]n employer's investigation of a sexual harassment complaint is not a gratuitous or optional undertaking; under federal law, an employer's failure to investigate may allow a jury to impose liability on the employer." *Malik v. Carrier Corp.*, 202 F. 3d 97, 105 (2d Cir. 2000). Today both the existence and the contours of employer anti-harassment procedures are largely the result of Title VII.

This Court's decisions in *Ellerth* and *Faragher* provide particular support for the conclusion that an employer's remedial mechanism invoked by a harassment victim is a proceeding, hearing, or investigation "under this title." Under those decisions a harassment victim in certain circumstances may be

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[35] Sidley Austin LLP, *EEOC Issues Guidance on Employer Liability for Harassment by Supervisors*:

> [T]he Guidance . . . offers critical insights into steps that employers can take to reduce or avoid liability for supervisory harassment. Although not legally binding on courts or employers, the Guidance is significant because courts often rely on EEOC pronouncements such as the Guidance when deciding harassment cases.
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> In light of the EEOC Guidance and recent court decisions interpreting *Ellerth* and *Faragher*, we recommend that employers take the following steps: . . . [r]eview harassment investigation and complaint resolution processes.

http://www.sidley.com/news/pub.asp?PubID=93430542000&print=yes (visited November 6, 2007).

denied relief if she or he "unreasonably failed to take advantage of any preventative or corrective opportunities." *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. A mechanism which Title VII itself at times compels an employee to utilize is assuredly a mechanism "under this title." *See NLRB v. Scrivener*, 405 U.S. 117, 124 (1972)(compliance with NLRB subpoena is protected by NLRA from retaliation); *Pedersen v. NLRB*, 234 F. 2d 417, 420 (2d Cir. 1956)(same); *see Jordan v. Alternative Resources Corp.*, 458 F. 3d 332, 355 (unless employees are protected by section 704(a) when they attempt to utilize an employer's corrective mechanism, they will be "faced with a 'Catch-22.' They may report such conduct to their employer at their peril, or they may remain quiet and work in a . . . hostile and degrading work environment, with no legal recourse beyond resignation."), 356 ("employees are always protected by Title VII's anti-retaliation provision whenever they are obliged to report improper conduct under the *Ellerth / Faragher* defense, as otherwise some employees will be commanded to report such conduct at their peril.")(4th Cir. 2006)(King, J., dissenting). In the instant case Crawford did precisely what *Ellerth* and *Faragher* required by providing information about Hughes' harassing conduct to responsible personnel officials.[36]

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[36] Crawford's complaint in the instant case included a claim for sexual harassment. Complaint, par. 21. The employer's answer specifically alleged the *Ellerth* and *Faragher* affirmative defense, and asserted that "plaintiff failed to take advantage of opportunities to avoid harm." Answer, par. 13. Crawford's sexual harassment claim was ultimately dismissed on procedural grounds. Order, April 6, 2004.

The fact that an employer's managers or personnel officials may want employees to file internal complaints and provide evidence during internal investigations of discrimination does not guarantee that retaliation will not occur. In the case of sexual harassment in particular, the discriminatory official--who may be at risk of discipline or even dismissal--has much to gain by intimidating the victim or potential witnesses into silence. Where, as here, that official initially escaped punishment for the harassment, reprisals against a complaining party or witness would be an effective tactic to intimidate other potential complainants and witnesses, and thus to facilitate future harassment. If, as the Sixth Circuit held, those reprisals (and, thus, such threats) are permissible, the abusive official can be confident that any anti-retaliation litigation will be dismissed--as occurred in the instant case--without inquiry into whether the asserted retaliation occurred. By unequivocally forbidding such reprisals, the participation clause vindicates the interests of an employer itself in obtaining the information needed to end discrimination voluntarily.

The investigation[37] at issue in the instant case manifestly was intended to "detect or root out discrimination prohibited by Title VII." The

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[37] If a plaintiff were retaliated against for filing an internal complaint, that action would be protected as participation in a "proceeding . . . under this title" so long as the plaintiff was invoking an internal process to detect or root out discrimination prohibited by Title VII. In the wake of this Court's decisions in *Faragher* and *Ellerth*, of course, most employers have just such processes for dealing with harassment.

investigation was expressly concerned with behavior "that might constitute Sexual Harassment," and the investigators characterized the allegation that was the subject of the inquiry as an "EEO claim." (Br. Op., App. 9, 16). The investigation sought to address "all allegations made by the complainants that would be covered under EEO guidelines." (*Id.* at 9). The guidelines referred to in the Metro anti-harassment policy are evidently the 1980 EEOC Guidelines on Discrimination Because of Sex.[38] The lead investigator explained that her responsibility at Metro was "for investigating complaints of discrimination at Metro."[39]

C. Inclusion of Employer Internal Processes Within The Protections of the Participation Clause Is Important To The Implementation of Title VII

Unequivocal protection of witnesses and complainants in an employer's internal processes is essential if those mechanisms are to be effective in detecting and correcting sexual harassment and other violations of Title VII.

As the instant case illustrates all too well, there already exist among victims of sexual harassment widespread and well-founded fears that they will be punished for speaking up about sexual harassment.[40]

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[38] See n. 30, supra.

[39] Frazier Dep., p. 6, JA 32-33.

[40] *See, e.g.*, Louise F. Fitzgerald et al., *Why Didn't She Just Report Him?: The Psychological and Legal Implications of Women's*

Metro officials found it necessary to repeatedly assure potential witnesses--contrary to the position Metro took in the subsequent litigation--that they could not be fired for providing information about sexual harassment.[41] The United States Chamber of Commerce has cautioned businesses that "witnesses are often reluctant to come forward out of fear of reprisal."[42] See National Association of Realtors, Legal

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Responses to Sexual Harassment, 51 J. Social Issues 117 (1995); Cheryl R. Kaiser & Carol T. Miller, *Stop Complaining! The Social Costs of Making Attributions of Discrimination*, 27 Personality and Social Psych. Bulletin 254 (2001); Ellen R. Pierce, Benson Rosen & Tammy Bunn Hiller, *Breaking the Silence: Creating User-Friendly Sexual Harassment Policies*, 10 Emp. Resps. & Rts. J. 225 (1997).

This problem is described in detail in the Brief Amicus Curiae of the National Womens' Law Center, et al.

[41] Frazier Dep., pp. 11 ("I advise employees that retaliation is prohibited because that's often-- it is usual for employees to bring that up to me"; see JA 38), 12, 61 (Frazier advised Proffitt and others that they were "protected against retaliation" because if they were retaliated against they "had recourse,"; Sadler Affidavit, par. 6 ("I told Jennifer Bozeman [the attorney who first learned of the harassment] that I would end up losing my job over this. Jennifer Bozeman assured me that I would not lose my job over this."); Proffitt Affidavit, par. 13 ("I, at that point told Veronica Frazier that I was very concerned and felt that I would lose my job if I participated in this investigation. I was assured by Veronica Frazier that that would not happen."), 14 (Proffitt provided information to Frazier "[b]ased upon this assurance.").

[42] See http://www.uschamber.com/sb/business/tools/sxhrst_m.asp (Click on "sexual harassment aids." This admonition is on the last unnumbered page of the document, under the heading "Interviewing Witnesses")(visited November 6, 2007).

Update: Sexual Harassment ("Many employees are embarrassed to [report sexual harassment] or are fearful of retaliation.")[43]; United States Chamber of Commerce, Employer Toolkit ("[w]hen an employee actually gets the nerve up to report harassment, they are usually already apprehensive and scared.").[44]

The EEOC has concluded from many years of experience that protection of witnesses and complainants is critical.

> Employee cooperation is essential to making such internal investigations effective, yet employee cooperation will hardly be forthcoming if employees are unprotected against retaliation in the event they provide unfavorable information about their supervisors.
>
> In the absence of protection against retaliation, witnesses and victims would be understandably reluctant to participate in an investigation into unlawful conduct, which, in turn, would undermine Title VII's purpose to spur employers' efforts to deter and detect unlawful discrimination in the workplace.

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[43] https://www.realtor.org/comag.nsf/pages/Legal_Update_Sexual NARs_L?OpenDocument (visited November 6, 2007).

[44] http://www.uschamber.com/sb/business/P05/P05_5185.asp (visited November 6, 2007).

Brief for the United States as Amicus Curiae, pp. 9, 19-20; see *Enforcement Guidance on Vicarious Employee Liability for Unlawful Harassment by Supervisors*, 2 EEOC Compl. Man. (BNA) Pt. V(C)(1)(b) at 615-0108 n. 59 (Oct. 2002)("Surveys have shown that a common reason for failure to report harassment to management is fear of retaliation . . . [and] a significant proportion of harassment victims are worse off after complaining.")(citations omitted). Here, as in *Robinson v. Shell Oil Corp.*, 519 U.S. 337, 345-46 (1997), the Commission's practical judgment is entitled to significant weight.

The "exceptionally broad protection" accorded by the participation clause provides to potential claimants and potential witnesses unequivocal assurance that they cannot lawfully be punished for taking part in an employer's internal processes. See *Pettway v. American Cast Iron Pipe Co.*, 411 F. 2d 998, 1006 n. 18 (5th Cir. 1969). "[O]nce the activity in question is found to be within the scope of the participation clause, the employee is generally protected from retaliation." *Booker v. Brown & Williamson Tobacco Co., Inc.*, 879 F. 2d 1304, 1312 (6th Cir. 1989). If an employee's actions are covered by the participation clause, the employer cannot retaliate against the worker because it feels that his or her complaint was unwarranted or unfair. *Pettway*, 411 F. 2d at 1007; *Womack v. Munson*, 619 F. 2d 1292, 1298 (8th Cir. 1980). By according to participation in an employer's internal processes the same degree of protection that is accorded to participation in the machinery of the EEOC, section 704(a) avoids creating any incentive to shun the employer's remedial mechanisms for those provided by the Commission.

Although, as we explain below, the opposition clause also applies to witnesses (and complaining parties) involved in an employer's internal mechanisms, the more limited protections of the opposition clause are not sufficient to overcome the serious danger of retaliation that those employees may face. "The opposition clause is less expansive [than the participation clause.]" 1 B. Lindemann and P. Grossman, Employment Discrimination Law, 998 (4th ed. 2007). An employee's complaint about or description of sexual harassment would not invariably be protected by the opposition clause; in some circumstances an employer could mount a fact-based argument that the employee's actions were not safeguarded by the opposition clause. Witnesses whose statements were important to an internal investigation, but who were not themselves opposing any asserted discrimination, would not be protected by the opposition clause at all.

The opposition clause protects statements made (or actions based on beliefs held) in good faith.[45] When an

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[45] All twelve geographical circuits have interpreted the opposition clause in this manner. *Benoit v. Technical Mfg. Corp.*, 331 F. 3d 166, 174 (1st Cir. 2003); *Kessler v. Westchester County Dept. of Social Services*, 461 F. 3d 199, 210 (2d Cir. 2006); *Moore v. City of Philadelphia*, 461 F. 3d 331, 341 (3d Cir. 2006); *Peters v. Jenney*, 327 F. 3d 307, 320 (4th Cir. 2003); *Wilson v. UT Health Center*, 973 F. 2d 1263, 1267 (5th Cir. 1992); *Booker v. Brown & Williamson Tobacco Co., Inc.*, 879 F. 2d 1304, 1312-13 (6th Cir. 1989); *Bernier v. Morningstar, Inc.*, 495 F. 3d 369, 375 (7th Cir. 2007); *Barker v. Missouri Dept. of Corrections*, 513 F. 3d 831, 834 (8th Cir. 2008); *Trent v. Valley Elec. Ass'n Inc.*, 41 F. 3d 524, 525 (9th Cir. 1994); *Petersen v. Utah Dept. of Corrections*, 301 F. 3d

employee reports being sexually harassed, it will almost always be possible for the employer to advance an argument that the employee acted in bad faith. The employer need only offer testimony from the alleged harasser denying that he engaged in the alleged misconduct. The employer could then argue that, because the complaining employee would have had personal knowledge of the events in question (e.g., what the alleged harasser did or did not say or do), the employee's complaint must have been, not a mistake, but a lie. In this respect complaints about sexual harassment are even more risky for the employee than complaints about other types of discrimination. If a worker asserts that she was denied a promotion or paid less because she is a woman, it would often be difficult for an employer to establish she acted in bad faith, because the key exculpatory information (including the motive of the decisionmaker) frequently would have been unknown to the complaining employee. The "he said-she said" nature of many sexual harassment controversies, on the other hand, means that most harassment victims who seek to invoke the protections of the opposition clause would be running the risk that their employer could argue at trial that their complaints were inaccurate and thus made in bad faith.

A potential witness or complaining party able to rely only on the opposition clause might well conclude that the uncertainties involved in the litigation of

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1182, 1188 (10th Cir. 2002); *Little v. United Technologies, Carrier Transicold Div.*, 103 F. 3d 956, 960 (11th Cir. 1997); *Parker v. Baltimore & O. R. Co.*, 652 F. 2d 1012, 1018 (D.C.Cir. 1981).

those issues--a danger that would not exist if the complainant went instead to the EEOC or the witness remained silent--are too great to justify participation in an employer's internal processes. The law accords to witnesses in civil and criminal litigation absolute immunity, rather than merely qualified immunity, precisely because such uncertainties as to the outcome of future litigation would be likely to chill "candid, objective, and undistorted" testimony. *Briscoe v. LaHue*, 460 U.S. 325, 330-34, 343 n. 29 (1983).

Some witnesses taking part in an investigation or hearing, although providing the employer with important relevant information, might not be opposing (or even be aware of) any asserted violation of Title VII. Such a witness, for example, might only have information about the qualifications of a complainant who was denied a promotion, or about whether a dismissed worker had been actually guilty of certain alleged misconduct. In a sexual harassment case, a witness might be able to confirm a key part of the complainant's claim--such as whether the alleged abuser repeatedly went into the complainant's office--without knowing whether harassment had occurred. Indeed, some witnesses providing such potentially important information to their employers might not know the purpose of the employer's inquiry or the nature of the problem under investigation.

In light of this uncertainty as to the availability of the protection of the opposition clause, a prudent attorney might well have to advise discrimination victims to bypass complaining to their employers, and to instead file charges with the EEOC, because such an EEOC charge would enjoy absolute protection

under the participation clause.[46] That course of action would assure that the complainant could not be fired or otherwise punished because of the limitations of the opposition clause, and might reduce the risk that potential witnesses could be compromised because they withheld important information during an internal investigation not protected by the opposition clause.

For similar reasons a responsible attorney would have to advise some, perhaps many potential witnesses to try to avoid taking part in an employer's internal investigation, hearing, or proceeding. Otherwise, potential witnesses could find themselves caught between the Scylla of abuser retaliation (for disclosing harassment or other discrimination) and the Charybdis of official discipline (for refusing to answer questions). Facing these twin dangers, a cautious employee might well be tempted to simply feign ignorance, or to provide exculpatory but inaccurate information. Employers as a consequence could at times fail to detect unlawful discrimination by their supervisors or other workers and thus face increased financial liability when those violations ultimately come to light.

Deterring the use of employer-created internal processes would be inconsistent with the congressional intent to foster the creation of those very mechanisms.

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[46] To the extent that an employee, under *Faragher* and *Ellerth*, may be required to notify her employer about harassment so that the employer can take preventative or corrective action, notification in the form of an EEOC charge would, of course, suffice.

Both employers and employees, moreover, would be ill-served by an interpretation of section 704(a) that forced or encouraged discrimination victims to bypass an employer's internal processes and instead to immediately file charges with the EEOC. The action of an aggrieved employee in filing such a charge with a federal agency may create an adversarial relationship between the parties that could obstruct settlement of the underlying dispute. An employer that might have welcomed a chance to address a problem internally may become more intransigent in dealing with government officials, anticipating that the EEOC charge is likely to lead to litigation. If an employer retains an attorney to help respond to the EEOC charge, premature resort to the Commission will increase costs. Forcing or encouraging discrimination victims to bypass an employer's internal processes and instead complain to the EEOC would in some cases delay the point in time at which an employer's officials (other than the perpetrator) first learn of a problem of harassment or other discrimination. With the passage of time the victim's "employment situation [may have] become so untenable that conciliation efforts would be futile." *Federal Express Corp. v. Holowecki*, 128 S.Ct. 1147, 1157 (2008). The implementation of Title VII would be facilitated by a construction of section 704(a) that avoids these counter-productive incentives by according to participation in an employer's internal processes the same protection accorded to participation in EEOC proceedings.

II. PETITIONER'S CONDUCT WAS PROTECTED BY THE OPPOSITION CLAUSE OF SECTION 704(a)

Section 704(a) forbids retaliation against an employee because he or she "opposed any practice, made an unlawful employment practice by this title." The opposition clause applies to a number of different types of actions that would appropriately be characterized as opposition.[47] The meaning of "oppose[]" relevant to the instant case is taking action (including making a statement) to end, prevent, redress, or correct unlawful discrimination. The protected employee need not express or have any view about whether the discrimination violates Title VII, or even know that Title VII exists. For example, the opposition clause would protect a worker who wrote a letter to the company CEO simply asking that the employer not lay off workers based on their race.

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[47] For example, in addition to the meaning at issue in the instant case, protected opposition might also take the form of (a) statements or actions expressing general disapproval of discrimination (e.g., "I am against paying women less than men for doing the same work", or joining the NAACP), (b) adhering to such a belief (for example, during Jim Crow some whites in the South were opposed to racial segregation, even though they did nothing to stop it and kept their opinions largely to themselves), (c) refusal to obey an order to reasonably believed to violate the law, (d) rejecting sexual advances, (e) making inquiries to determine if discrimination had occurred, or (f) providing assistance or support for an individual engaging in any such conduct. See 1 B. Lindemann and P. Grossman, Employment Discrimination Law, pp. 1011-13 (2007); EEOC Compl. Man. (BNA) § 8-II(B)(2).

Actions taken or statements made to *prevent* the occurrence of some action or state of affairs are classic examples of opposition. Opposition is not limited to efforts to undo a problem that has already occurred. Thus we describe members of the public and of Congress as having opposed President Roosevelt's court-packing scheme, President Clinton's health plan, and President Bush's Social Security proposals, although none of those measures were ever enacted. Even those who do not believe that global warming is occurring or will ever occur would describe former Vice-President Gore as opposing global warming.

When an employee complains about sexual (or other) harassment, her opposition usually is intended primarily to prevent harassment. Other forms of discrimination, such as a discriminatory dismissal or promotion decision, can be corrected by reversing the disputed decision and perhaps providing backpay. Employers can and do provide such retrospective redress. E.g., *Burlington Northern & Santa Fe Rwy. Co. v. White*, 126 S.Ct. at 2409 (employer reinstated dismissed worker and awarded backpay). But an act of harassment, unlike a promotion or dismissal decision, cannot be reversed; with harassment, what is done is done. Few if any employers have an internal process that awards damages (as distinct from backpay) to harassment victims. Thus when an employee complains to her employer about sexual harassment, what she is usually seeking is action by the employer that will prevent a continuation of harassment that has already occurred.

What Title VII forbids is not any particular act of harassment, but the creation--as a result of such acts--

of a hostile work environment. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993). Ordinarily[48] a series of harassing incidents are required to create such an environment. *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 115-16 (2002). But employees, understandably unfamiliar with Title VII caselaw, do not file complaints objecting in haec verba to the existence or possible creation of a "hostile work environment." Rather, harassment victims usually complain, as here, about particular acts of harassment.

Often the most effective action an employee can take to prevent (and oppose) the creation of an unlawful hostile work environment is to notify her employer about just such past harassment incidents. This Court's decisions in *Faragher* and *Ellerth* encourage harassment victims to oppose harassment, and thus prevent the creation of an unlawful hostile environment, in precisely this manner. An employer which knew of such past incidents but failed to prevent their recurrence could not assert the affirmative defense recognized by *Faragher* and *Ellerth*. In certain circumstances an employee may forfeit her damage claim under Title VII if she unreasonably "fail[s] to take advantage of any preventative . . . opportunities provided by her employer." *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765. When an employee brings an incident of sexual (or other discriminatory) harassment to the attention of his or her employer,

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[48] The lower courts have recognized that in some extreme circumstances, such as a rape, a single act could create a hostile work environment. *Lapka v. Chertoff*, 517 F. 3d 974, --- (D.C.Cir. 2008); *Ferris v. Delta Air Lines, Inc.*, 277 F. 3d 128, 136 (2d Cir. 2001).

that action by its very nature constitutes opposition to a hostile work environment, regardless of whether that unlawful environment already exists (and the worker is thus seeking to end a violation of Title VII)[49] or could occur if the harassment continued (and the worker is thus seeking to prevent a violation of Title VII.)

An employee need not wait until there have been so many incidents of harassment that the creation of an unlawful hostile environment is imminent, certain, or even likely. After all, an employee would be protected by the opposition clause if--in the absence of any harassment whatever at her place of employment--she wrote a letter to the editor of her local (or the company) newspaper stating in general terms that she opposed sexual harassment, was grateful that Title VII had been enacted, or endorsing this Court's decision in *Harris v. Forklift Systems, Inc.* If an employee complains about a particular act of alleged harassment, that complaint is protected by the opposition clause so long as the *type* of incident is one which, with sufficient repetition, could create an unlawful hostile work environment. An attempt to prevent the recurrence of conduct whose repetition would lead to a violation of Title VII is opposition to such a violation.

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[49] Where past incidents have already created a hostile work environment, of course, an employer may well need to do more than merely prevent a recurrence of those acts. Affirmative measures, such as transferring, disciplining, or dismissing the harasser, will often be required to dispel that hostile environment.

A statement or action constitutes opposition if it "would reasonably [be] interpreted as opposition." 2 EEOC Compl. Man. (BNA) § 8-II(B)(2), at 614:0003. A trier of fact could assuredly find that that standard was met in the instant case. The abusive conduct which Crawford described was exceptionally offensive; Metro would have known that any woman in Crawford's position would assuredly have wanted the employer to prevent further incidents. Crawford made her statement about that harassment in response to a question as to whether Hughes had engaged in "inappropriate behavior." (JA 12). Petitioner reported that she had "felt very uncomfortable around Mr. Hughes" because he "would grab himself" whenever she would speak to him." (JA 16). It is difficult to imagine how these statements could be interpreted as anything other than an indication that Crawford found Hughes' conduct objectionable and wanted it stopped. Indeed, there is evidence (although such evidence was not necessary) that Metro in fact did understand that Crawford opposed Hughes' actions. The Metro investigative report characterized Crawford and the other witnesses who reported the sexual harassment as aggrieved individuals, not simply as disinterested bystanders; it described them as "the complainants"[50] and characterized their allegations as an "EEO claim." (Br. Opp., App. 9).

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[50] Veronica Frazier, one of the Metro officials who conducted the deposition, referred to the women who had reported sexual harassment as "these complaining employees." Frazier Dep., p. 26, JA 42; see Pedro Garcia Dep., JA 55 ("claims against Gene Hughes"), JA 67 ("sexual harassment charges").

A jury also could reasonably conclude that the acts of harassment about which Crawford complained were the types of incidents which if repeated with sufficient frequency would create (if they had not already done so) an unlawful hostile work environment. For example, asking a women employee to "[l]et me see your titties" obviously is not merely a commonplace act of minor incivility. Assessing whether a series of harassing incidents would create a hostile work environment (like assessing whether such an environment existed) is a quintessential jury task.

> Today, while gender relations in the workplace are rapidly evolving, and views of what is appropriate behavior are diverse and shifting, a jury made up of a cross-section of our heterogenous communities provides the appropriate institution for deciding whether borderline situations should be characterized as sexual harassment . . . .

Gallagher v. Delaney, 139 F. 3d 338, 342 (2d Cir. 1998). Whether Hughes' actions and remarks would be sufficiently serious sufficient, with repetition, to create a hostile work environment is not a borderline situation. See *Harris v. Forklift Systems, Inc.*, 510 U.S. at 24 (Scalia, J., concurring)(determination of whether harassment "is egregious enough to warrant an award of damages" is a task for juries.)

The Sixth Circuit did not doubt that in providing her graphic description of Hughes' harassment Crawford *intended* to oppose that abusive conduct. Notwithstanding the existence of such an intent, the Sixth Circuit held that purposeful opposition to

unlawful discrimination is only protected by the opposition clause of section 704(a) when three additional requirements are met. The court of appeals insisted that a plaintiff must also prove that the opposition was (1) "active", (2) "consistent", and (3) "overt." (Pet. App. 7a-8a). None of these restrictions have any basis in the text of section 704(a) and all of them are inconsistent with the purposes of Title VII.

The absence of any of these limitations from the text of section 704(a) is fatal to this proposed interpretation of the opposition clause. Other legislation regarding the EEOC does contain limiting language regarding the particular method of opposition. Section 714 of Title VII applies 18 U.S.C. § 111 to "oppos[ition]" directed at EEOC employees; section 111(a)(1) in turn makes it a crime only to "*forcibly* . . . oppose[]" officials in the performance of their duties. (Emphasis added). Other forms of opposition to EEOC personnel--e.g., engaging in financial reprisals against EEOC employees, or obstructing their work by destroying evidence or bribing witnesses--are not criminalized. Similarly, section 10 of the Age Discrimination in Employment Act, 29 U.S.C. § 629, forbids any person to "forcibly . . . oppose . . . a duly authorized representative" of EEOC in the performance of duties under that statute.[51] See

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[51] Many criminal prohibitions apply only to those who "forcibly" oppose federal officials in the conduct of their duties. E.g., 7 U.S.C. § 87(b)(a)(8); 15 U.S.C. § 1825(a)(2)(C); 16 U.S.C. § 773e(a)(3); 18 U.S.C. § 2237(a)(2). Other criminal provisions, however, apply without such limitation to any person who "opposes" certain federal activities. E.g., 16 U.S.C. § 1417(a)(6); 17 U.S.C. § 2435(5).

18 U.S.C. §§ 1501 ("knowingly and willfully" oppose), 1502 (same), 2384 ("oppose by force"); 29 U.S.C. § 1862 ("unlawfully" oppose). However, neither "forcibly" nor any other limiting adverb restricts the scope of the word "opposed" in section 704(a).

Nothing in the text or purpose of section 704(a) supports the Sixth Circuit's rule that opposition is only protected if it is "active." Opposition to discrimination is no less real, less effective, or necessarily less infuriating to an employer or an harasser merely because it is relatively low key, quiet, or even entirely passive. A cautious worker might think it prudent to avoid speaking up about discrimination until there was some specific affirmative indication--like the employer-initiated investigation in the instant case--that the employer might be genuinely interested in correcting a particular practice. Certainly many victims of sexual harassment choose to prevent that abuse, not by upbraiding the offending supervisor, but by trying to stay, literally, out of reach. "Passive resistance is a time honored form of opposition." *McDonnell v. Cisneros*, 84 F.3d 256, 263 (7th Cir. 1996). Indeed, passive resistance was a touchstone of the very civil rights movement that led to the enactment of the 1964 Civil Rights Act.

Similarly, the language of section 704(a) does not limit the opposition clause to individuals who "initiate" or "instigate" a complaint. (Pet. App. 7a). An act of opposition can occur in a situation not initiated by the employee herself. Rosa Parks did not "initiate" the arrest that sparked the historic 1955 Montgomery bus boycott. She sat behind the movable sign reading "Colored," "not expecting any problems, as there were

several empty spaces at the whites-only front of the bus." When more white passengers got on than there were seats in the front of the bus, black passengers were expected to move further back or stand. It was the bus driver who approached Parks, initiated the conversation, and asked whether she was going to give up her seat to a white passenger. Rosa Parks merely said "No."[52]

It would make no sense to protect only the individual who initiates a complaint process, and then exclude from the statutory protections the very witnesses whose statements may be essential to determining the merits of the initial allegations, or fellow employees who may thereafter provide the complaining employee with information or moral support. In sexual harassment cases, post-complaint evidence from persons other than the original complainant is often of critical importance in convincing an employer that harassment has occurred.[53] If abusers knew that under section 704(a) they could with impunity retaliate against such often essential supporting witnesses, employers would be frustrated in their efforts to comply with Title VII.

The Sixth Circuit held that the opposition clause does not protect those who "appear [ ] for questioning

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[52] Douglas Brinkley, Rosa Parks, pp. 105-07 (2000).

[53] See e.g., *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 61-61 (1986)(describing testimony by other employees). There was similar testimony in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). See Brief for Petitioner, p. 5 (No. 92-1168); 1993 WL 302216 *5.

. . . and . . . relat[e] information." (Pet. App. 7a). But in many instances--despite the fact that the employer is seeking information about a possible violation of Title VII--whether an employee will actually provide that information may turn on whether or not the employee wants to assist in the detection and eradication of discrimination. An employee who simply did not care whether a discriminatory supervisor was stopped or punished might well choose to avoid providing information that could provoke reprisals by a powerful official or lead to discipline of a fellow employee who was a friend of the witness. Congress in 1964 knew full well from the history of federal civil and criminal civil rights litigation in the South that white witnesses who did not personally oppose racial discrimination had only rarely been willing to "appear . . . and . . . relate unfavorable information about" defendants who had violated federal law. An employee may relate the information requested by the employer (and run any attendant risks) only because he or she is opposed to the discrimination in question.

Section 704(a) extends the protections of the opposition clause to any individual who has "opposed" violations of Title VII, regardless of whether that individual did so repeatedly or "consistent[ly]" (Pet. App. 7a) or engaged in multiple "opposing activities."[54] Once a single act of opposition has occurred, the

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[54] *Bell v. Safety Grooving and Grinding, LP*, 107 Fed. Appx. 607, 610 (6th Cir. 2004)(plaintiff "who sent only one letter contesting a single decision . . . did not engage in opposing *activities*.")(emphasis added). The court below expressly relied on *Bell*. (Pet. App. 7a).

statutory requirement--that the plaintiff have "opposed any practice, made an unlawful employment practice by this title"--has been fully satisfied; no "further action" is necessary. (Pet. App. 7a). If the opposition clause were limited to workers who engage in some sort of protracted campaign against discrimination, it would rarely if ever apply. A worker whose initial effort to end discrimination was unsuccessful might reasonably conclude that further protests would be pointless, if not counter-productive. If repeated "opposing activities" were required before the protections of section 704(a) went into effect, an employer would be at liberty to dismiss a worker after the first act of opposition, before he or she was able to establish the requisite record of "consistent" opposition.[55]

The text of section 704(a) does not require that opposition be "overt." The opposition clause protects the cautious as well as the brazen. Congress assuredly did not intend the protections of the opposition clause to be limited to workers, like the fictional Norma Rae, who throw down the gauntlet to management actively, openly, and repeatedly. The far larger number of less emboldened employees whose opposition to discrimination may be quiet, subtle or isolated are essential to the remedial scheme and to the implementation of Title VII's substantive commands. Certainly an employee is not required to make a specific "demand for . . . the relief [he or she] seeks", as

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[55] In the instant case, Crawford complained again about Hughes' actions in October 2002. (Crawford Dep., pp 16-17). Respondent, however, had by then already started the investigation that led to her dismissal

is required in a civil complaint. Fed. R.Civ.P. (8)(a)(3). Nor is the worker obligated to label his position a "charge," or include an express "request for the [employer] to take remedial action." *Federal Exp. Corp. v. Holowecki*, 128 S.Ct. 1147, 1158 (2008).

A worker may opt for a less confrontational form of opposition precisely because he or she is afraid of retaliation. Retaliation is a particularly serious problem for victims of sexual harassment, who often respond to that danger by seeking to find ways to end the harassment without being so overt as to provoke the abuser. It would be a perverse interpretation of section 704(a) to hold that sexual harassment victims lose the statutory protection from retaliation if they take prudent steps to avoid retaliation.[56] Under such a legal regime, a harasser by spreading fear of retaliation could create a license to retaliate. If workers could only obtain the protections of the opposition clause by utilizing tactics that maximized the risk of retaliation, they might reasonably conclude that the sensible choice is to remain silent. Employees, after all, "want jobs, not lawsuits." *Ford Motor Co. v. EEOC*, 458 U.S. 219, 229 (1982).

For an employee asked by his or her employer to respond to questions about harassment or other

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[56] An anonymous objection to alleged harassment or other discrimination is obviously not overt, because the identity of the objector is purposefully hidden. Surely, if the identity of an anonymous complainant later becomes known, Title VII would not then permit the employer to retaliate against the worker precisely because that employee had tried to remain anonymous in order to avoid retaliation.

discrimination, the decision below would accord the protection of the opposition clause only to a response fashioned with considerable legal ingenuity. To avoid exposure to lawful retaliation, such a worker would have to announce on the spot, in haec verba, that his or her response was intended to be a formal complaint, to spell out with specificity the elements of a Title VII violation, and then promptly to repeat that complaint at least once--if not more often--in some other manner or forum. No employee could know that such fancy legal footwork is required, and few if any could afford to bring to meetings with personnel officials an attorney to provide legal advice.

CONCLUSION

In the decades since the enactment of Title VII, as the enforcement of that statute has been strengthened and refined, the use of retaliation to suppress complaints and inculpatory information has assumed increased importance as a method of facilitating violations of the law. The numbers of retaliation charges filed with the EEOC has risen accordingly.[57]

This problem is of particular importance with regard to sexual and other forms of unlawful harassment. Unlike other violations of Title VII, harassment--particularly sexual harassment--is not a witness-less violation. The victim has painfully personal knowledge of all that has occurred, can

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[57] Between 1997 and 2007 the proportion of EEOC charges including a charge of retaliation rose from 22.6% to 32.3%. See http://www.eeoc.gov/stats/charges.html (visited April 6, 2008).

identify the abuser, and has every reason to want that harassment ended and the perpetrator punished. Today--unlike forty years ago--a sexual harasser often has good reason to fear that his continued employment could be at risk if the victim were to speak up and ultimately convince the employer that sexual harassment had occurred. No supervisor knowingly engages in sexual harassment that is being videotaped or recorded.[58]

The use of fear of reprisals to deter and punish complainants and witnesses is thus the very linchpin of sexual harassment. The threat of such retaliation is inextricably intertwined with the harassment itself. Abuser and victim alike understand clearly the power relationship and the omnipresent implicit threats that underlie sexual harassment on the job.[59] Abusers

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[58] See N. Bernstein, "An Agent, A Greencard, and A Demand for Sex", New York Times, March 21, 2008 (victim secretly recorded federal immigration official demanding sex in return for greencard; official arrested).

[59] *Faragher v. City of Boca Raton*, 524 U.S. at 803-05:

> When a fellow employee harasses, the victim can walk away or tell the offender where to go, but it may be difficult to offer such responses to a supervisor, whose "power to supervise-[which may be] to hire and fire, and to set work schedules and pay rates--does not disappear . . . when he chooses to harass through insults and offensive gestures . . . . " Estrich, Sex at Work, 43 Stan. L.Rev. 813, 854 (1991).
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> * * *
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> Supervisors do not make speeches threatening sanctions whenever they make requests . . . and yet every subordinate employee knows that the sanctions exist.

select as victims precisely those individuals who would be vulnerable to retribution if they attempted to complain. Even the most lascivious abusers do not harass their own supervisors or the boss's daughter. The complaint in this case alleges that one of the highest ranking officials of the Metro County School District repeatedly asked a payroll worker to "show me your titties." That official most assuredly would never have made such a demand of a woman who was a member of the Metro County Council, a Special Agent of the Federal Bureau of Investigation, an auditor for the Internal Revenue Service, or an airport screener for the Transportation Security Administration.

Exceptionless enforcement of section 704(a) is an essential tool to rooting out sexual harassment. If, as the Sixth Circuit held, an employee can be fired because her objection to sexual harassment was made at the wrong time, to the wrong person, or in the wrong terms, many harassment victims will sensibly regard that as no protection at all. Few if any potential witnesses will be in a position to afford the legal advice required to devise the sophisticated tactics needed to obtain protection under the Sixth Circuit's crabbed interpretation of section 704(a). In the nation's plants and offices, a decision by this Court that some internal complaints or statements about discrimination can lawfully result in dismissal will be understood only to mean that speaking up about sexual harassment has become even more dangerous and imprudent.

For the above reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

VICKY S. CRAWFORD,

Petitioner,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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STATEMENT OF THE CASE

Ms. Crawford was interviewed by the Metropolitan Government's Human Resources Department in-house sexual harassment investigators on July 22, 2002, in connection with a sexual harassment complaint made by someone else. Cert. Br. Opp. App. 5-6. Prior to that meeting with the investigators, Ms. Crawford did not even know that a sexual harassment investigation was underway. Cert. Br. Opp. App. 6. She had no idea why she was summoned to Human Resources. *Id.* The target of the investigation was Gene Hughes, the Director of Employee Relations, a division of the Metropolitan Board of Public Education's Human Resources Department.[1]

At the July 22, 2002, interview, Ms. Crawford related the alleged incidents of sexual harassment she described in her deposition. JA 16-20. Mr. Hughes's objectionable conduct allegedly occurred from August 2001 to May 2002 (Ms. Crawford was out of the office for six to eight weeks in April and May). JA 19.

Veronica Frazier, the Assistant Director of the Metropolitan Government's Human Resources Department who conducted the investigation, recalls that Ms. Crawford stated she and Mr. Hughes had "banter back and forth . . . which was inappropriate."[2]

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[1] Mr. Hughes worked in an entirely different division of the school administration from Ms. Crawford. He was not Ms. Crawford's supervisor. JA 71, 95.

[2] The Board of Education's Human Resources Department is separate from the Metropolitan Government's Human Resources Department. Mr. Hughes and Ms. Frazier worked in separate Human Resources departments.

JA 46. She recalls Ms. Crawford mentioning the use of the phrase "bite me" and Mr. Hughes grabbing his crotch. *Id.* Ms. Crawford acknowledged to Ms. Frazier that she (Ms. Crawford) would "flip him a bird." JA 48. One of Ms. Frazier's impressions was that this inappropriate, unprofessional banter had unfortunately become "established . . . [as] their interaction in workplace culture." *Id.* Ms. Frazier concluded that when "there are two employees, two co-workers, who engage in that inappropriate . . . unprofessional conduct, they don't consider themselves sexually harassing one another. It becomes part of, as I said, the workplace culture." JA 49-50.

Ms. Frazier continued her investigation through the summer, and on September 13, 2002, she issued her Fact Finding Report. Cert. Br. Opp. App. 8. She described the circumstances which gave rise to her investigation, she listed the persons interviewed, she anonymously summarized the substance of the witness statements, and she stated her conclusions and observations. Cert. Br. Opp. App. 8 – 17. Generally, she concluded that while inappropriate and unprofessional conduct had occurred, the most egregious allegations of sexual misconduct directed at Mr. Hughes could not be corroborated. *Id.* at 15. She recommended training and education for the management and staff at the Board of Education geared towards "establish[ing] and maintain[ing] a productive workplace that is respectful of all employees."

Id. at 17. Ms. Frazier sent the report to Dr. Pedro Garcia, Director of Schools.[3]

Upon reviewing the Fact Finding Report, Dr. Garcia verbally reprimanded Mr. Hughes, reiterating that sexual harassment is not allowed, and making clear that Mr. Hughes needed to "watch very carefully what you say and do." JA 67-68.

During the sexual harassment investigation, Ms. Frazier "learned about other general allegations concerning the workplace environment at the Board of Education." Cert. Br. Opp. App. 9. "[D]ue to the severity and seriousness of these claims . . . [she notified] the Internal Audit Division of the Finance Department . . . in order to ensure that these matters [were] investigated and resolved." *Id.* To that end, Ms. Frazier sent another letter on September 13, 2002, this one to Kim McDoniel, the head of the Internal Audit Division of the Department of Finance of the Metropolitan Government (the city's Finance Department, a completely separate entity from the Board of Education). Cert. Br. Opp. App. 18. This letter outlined the specific concerns Ms. Frazier had discovered regarding the business practices of the school system's Payroll Division, which was headed by Ms. Crawford.[4] These concerns included the Payroll Division's failure to honor certain wage garnishments, including those for child support payments. *Id.*

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[3] Ms. Frazier's September 13, 2002 cover letter to Dr. Garcia is at Record, 51, Motion for Summary Judgment, Ex. D.

[4] Ms. Frazier communicated these same concerns to Dr. Garcia in her cover letter to him. Record, 51, Motion for Summary Judgment, Ex. D.

Chris Henson, the Assistant Superintendent for Business and Facilities Services, started working for the school system on July 1, 2002. JA 89. He had supervisory authority over the Payroll Division. JA 90. He did not know either Dr. Garcia or Gene Hughes prior to his arrival. JA 81.

In the fall of 2002 Mr. Henson learned that the Internal Audit Division of the city's Finance Department had requested assistance from the outside accounting firm KPMG, LLP, to review the business practices of the Board of Education's Payroll Division. JA 90-91. The KPMG auditors brought to his attention problems they had uncovered in the Payroll Division, such as garnishments on employee paychecks not being paid to the courts, employee annuity payments not being made to the appropriate companies, checks payable to the Metropolitan Government not being deposited, and payroll taxes being paid to the IRS in an untimely manner.[5] JA 93. Furthermore, the three Payroll Division employees who worked under Ms. Crawford visited Mr. Henson, and made similar complaints. JA 92-93.

As a result of the mounting complaints of operational irregularities in the Payroll Division, the Department of Law of the Metropolitan Government contracted with KPMG for additional forensic accountant services to investigate the Payroll Division's operations.[6]

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[5] Ms. Crawford's untimely payment of payroll taxes to the IRS resulted in a penalty of over $1,000,000 being assessed against the Board of Education. Cert. Br. Opp. App. 34; Record, 51, Motion for Summary Judgment, Ex. L (Bates stamped pp. 380-81). Fortunately, after negotiation, the IRS rescinded the assessment of this penalty.

[6] A copy of the contract with KPMG for forensic accountant services is at Record, 51, Motion for Summary Judgment, Ex. I.

(Cont'd)

As a result of the evidence uncovered by KPMG's preliminary investigation, on November 7, 2002, Mr. Henson placed Ms. Crawford on paid administrative leave which allowed KPMG to further investigate the problems within her office. Cert. Br. Opp. App. 20. On December 4, 2002, Mr. Henson sent Ms. Crawford a letter detailing numerous operational irregularities within her office that raised serious concerns about her ability to perform as Payroll Coordinator. *Id.* at 21- 24. Ms. Crawford was given an opportunity to appear and present evidence on her behalf at a name-clearing hearing. *Id.* at 23. That hearing occurred on December 12, 2002.[7] Ms. Crawford was represented by counsel who made opening and closing statements, introduced documents into evidence, and presented the testimony of three witnesses. Ms. Crawford elected not to testify.[8]

Ms. Crawford remained on administrative leave with pay. On January 6, 2003, Mr. Henson sent Ms. Crawford a letter setting forth the charges against her and summarizing what transpired at the December 12, 2002 hearing. Cert. Br. Opp. App. 25-26. Based on the serious nature of the charges and the fact that Ms. Crawford

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(Cont'd)

The scope of the proposed work is set forth on page 6 thereof. A total of $85,656.00 was paid to KPMG for forensic accountant services under this contract. Record, 51, Motion for Summary Judgment, Ex. S.

[7] The entire transcript of this hearing appears at Record, 51, Motion for Summary Judgment, Ex. M. The documents introduced in evidence at this hearing are included.

[8] Record, 51, Ex. M, at 3.

presented "little defense or explanation . . . in response to the enumerated irregularites . . ." he terminated her employment. *Id.* at 26.

Ms. Crawford appealed Mr. Henson's decision to Dr. Garcia, the Director of Schools. Dr. Garcia conducted a hearing on February 6, 2003, at which Ms. Crawford again was represented by counsel.[9] The hearing lasted from 8:00 a.m. to 12:50 p.m. Record, 51, Motion for Summary Judgment, Ex. J, at 4, 198. On March 31, 2003, Dr. Garcia issued his 13-page decision, in which he described the evidence and testimony adduced at the hearing, and he affirmed Mr. Henson's decision to terminate Ms. Crawford's employment. Cert. Br. Opp. App. 28 – 41.[10]

Three months later, on June 24, 2003, Ms. Crawford filed a Charge of Discrimination with the EEOC claiming retaliation (not sexual harassment). Cert. Br. Opp. App. 42 - 43. In her Charge, she claimed she was "suspended then discharged in retaliation for [her] participation in a sexual harassment investigation." *Id.* at 43. Ms. Crawford did not claim she was sexually harassed.

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[9] The entire transcript of this hearing appears at Record, 51, Motion for Summary Judgment, Ex. J.

[10] The first eight of the twenty-four items that Dr. Garcia found Ms. Crawford mishandled were stale checks payable to the Metropolitan Government, which were found haphazardly lying around her office. Cert. Br. Opp. App. 31-32. The failure of a county official to deposit public funds within three days after receipt thereof is a crime in Tennessee. Tenn. Code Ann. § 5-8-207.

The EEOC issued Ms. Crawford a Dismissal and Notice of Rights letter on September 10, 2003. Cert. Br. Opp. App. 44 – 46. The EEOC was unable to conclude that the information obtained during its investigation established violations of the statutes. *Id.* at 45.[11]

Ms. Crawford filed suit against the Metropolitan Government, Dr. Garcia, and Gene Hughes, asserting sexual harassment and retaliation claims under 42 U.S.C. § 2000e, *et seq.* ("Title VII"), and the Tennessee Human Rights Act, Tenn. Code Ann. § 4-21-101, *et seq.* ("THRA"). Record, 1, Complaint. She later filed an Amended Complaint, adding a claim under Tenn. Code Ann. § 50-1-304 (the Tennessee "Whistleblower Act"). Record, 8. However, the District Court subsequently dismissed all claims against Dr. Garcia and Gene Hughes individually, as well as the sexual harassment claim (because Ms. Crawford did not claim sexual harassment in her EEOC Charge of Discrimination). Record, 23 & 24, Memorandum and Order.

After a lengthy period of discovery, the District Court granted the Metropolitan Government's Motion for Summary Judgment relying on the well-established body of law holding that "protected activity" under Title VII does not include participation in internal investigations conducted while no EEOC charge is pending. Cert. Pet. App. 15. The court also held that

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[11] More specifically, when the EEOC dismissed Ms. Crawford's claim it determined "there is not reasonable cause to believe that the charge is true." 42 U.S.C. § 2000e-5(b).

Ms. Crawford's act of merely answering questions in a previously pending internal investigation initiated by someone else did not constitute "opposition" under Title VII. The sole operative factual finding made by the District Court was that no EEOC charge was pending when Ms. Crawford was interviewed. Cert. Pet. App. 16a. [12]

On November 14, 2006, the Sixth Circuit affirmed the District Court's decision. Cert. Pet. App. 3a–10a.[13] The Court held that Ms. Crawford's conduct did not

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[12] The District Court granted summary judgment on the first ground advanced in the summary judgment motion. The Metropolitan Government made two additional arguments for summary judgment: (1) Ms. Crawford had no evidence the decision-makers knew what she allegedly told Veronica Frazier; and (2) assuming *arguendo* she could state a *prima facie* case, there were legitimate, non-discriminatory business reasons to terminate her employment, which were not pretextual. Record, 51, Motion for Summary Judgment, at 7 – 8; Cert. Br. App. 13a – 14a. The District Court did not consider these two arguments, because it found the first argument dispositive. Significantly, the District Court made no factual findings whatsoever about the circumstances surrounding the departures of Dianne Proffitt and Tamara Sadler. Cert. Br. App. 13a-14a.

[13] In passing, the Sixth Circuit mentioned the "three employees" Ms. Crawford contends were investigated and "promptly discharged," but that court attached no significance to this factual allegation in its decision. Pet. Cert. App. 5a. Now, however, Ms. Crawford presents detailed factual allegations supporting her contention that Ms. Proffitt and Ms. Sadler were also victims of retaliation. Pet. Br. 4 – 5. These facts were never developed by either the trial or appellate court. This leaves the Metropolitan Government no alternative but to cite to the relevant portions of the record to rebut Ms. Crawford's new factual allegations.

constitute "opposition" because she did not instigate or initiate any complaint prior to her interview, nor did she take any further action after her interview to "oppose" what she ostensibly believed to be an unlawful employment practice. *Id.* at 7a. The Court also found Ms. Crawford had not "participated" in an investigation under Title VII because no EEOC charge had been filed at the time of her interview or prior to her termination of employment. *Id.* at 8a. The Sixth Circuit's analysis of the participation clause was fully consistent with the approach taken by all other Circuit Courts of Appeal that have considered the issue. *Id.* In fact, the Court considered its decision sufficiently grounded in established precedent that its decision was unpublished.

Diane Proffitt was one of Ms. Crawford's former colleagues who participated in the investigation and whom Ms. Crawford claims also was allegedly terminated in retaliation for her participation. Pet. Br. 4. However, in her own retaliation lawsuit, both the District Court and the Sixth Circuit found that Ms. Proffitt's claim failed because she had no evidence that the decision-maker in her case knew what Ms. Proffitt allegedly told Veronica Frazier during the Gene Hughes investigation. Record, 51, Motion for Summary Judgment, Ex. A; *Proffitt v. Metropolitan Government*, 150 Fed. Apx. 439, 2005 WL 2446006, at *3-4 (6th Cir. Sept. 29, 2005), *cert. denied*, 547 U.S. 1003 (2006).

Tamara Sadler is Ms. Crawford's other former colleague whom she claims was retaliated against for her participation in the Gene Hughes investigation "only minutes after" receiving a copy of the Fact Finding

Report. Pet. Br. 5.[14] However, the reasons for Ms. Sadler's departure are clear from the record. On September 24, 2002, someone anonymously provided the Assistant Superintendent for Human Resources (Dr. Julie Williams) a copy of Ms. Sadler's felony conviction for embezzlement which had occurred on February 11, 1999, while she was a government employee. Record, 51, Motion for Summary Judgment, Ex. Q. Ms. Sadler never informed the Metropolitan Government of the fact that she was convicted of this felony while in the Metropolitan Government's employ.[15] *Id.* When confronted with this information, Ms. Sadler declined to participate in a name-clearing hearing, choosing instead not to return to work. Record, 51, Motion for Summary Judgment, Ex. R. As a result, Dr. Williams terminated her employment by letter dated October 1, 2002. *Id.* Understandably, given these circumstances, Ms. Sadler never filed an EEOC charge or a lawsuit claiming retaliation.

Ms. Crawford has no evidence that anything she told the Human Resources investigators about Gene Hughes

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[14] Tamara Sadler held the position of Director of Employee Relations until she was replaced by Gene Hughes in 2001. JA 63. Ms. Sadler was transferred to a secretarial position well before the incidents that are the subject of this case occurred. JA 67.

[15] Dr. Williams described the conviction as one for "fraud and theft." Record, 51, Motion for Summary Judgment, Ex. Q. Although the conviction occurred while Ms. Sadler was a government employee, the act of embezzlement occurred during her employment with a prior employer.

was ever communicated to Chris Henson or Dr. Garcia (the decision-makers regarding her employment). JA 24-28.[16]

SUMMARY OF ARGUMENT

I. The first step in statutory construction is to determine whether the language at issue is plain and unambiguous. In analyzing the reach of the "participation" clause, the term "investigation" in § 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3, clearly refers only to participation in investigations conducted after an EEOC charge is filed.

A. An examination of Congress's choice of words surrounding the term "investigation" in § 704(a) results in the conclusion that a covered "investigation" is one occurring after an EEOC charge has been filed. The use of the terms "charge," "testified," "proceeding," and "hearing" all indicate that Congress intended Title VII to protect employees from retaliation when they participate in the more formal investigations occurring after the statutory mechanisms of Title VII have been invoked, as opposed to the comparatively informal investigations that employers may conduct on their own.

The sequence of Congress's phrasing is also important. In describing the process, Congress starts

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[16] In this respect, Ms. Crawford's retaliation claim suffers from the same infirmity that resulted in summary judgment being entered against her former colleague Ms. Proffitt, a case which arose out of the same investigation as this one. *See Proffitt*, 2005 WL 2446006, at *3.

with the making of a "charge," and then logically progresses through the possible levels of involvement after an EEOC charge is filed – "testify[ing], assist[ing], or participat[ing] in any manner in an investigation, proceeding or hearing under this title." Based on a natural reading of the statute, Congress intended the filing of a charge to be the initial step to trigger the protections of the participation clause.

B. The most significant indicia of Congress's intent is that every time the words "investigation" or "investigate" appear in Title VII, without exception, they refer to an investigation actually conducted by the EEOC. As a result, the five Circuit Courts of Appeal that have squarely considered the issue have already given the term "investigation" in § 704(a) an expansive interpretation, by holding that the term applies to in-house, employer initiated investigations, as long as they follow the filing of an EEOC charge. Ms. Crawford advocates for an even more expansive interpretation that would extend the reach of § 704(a) well beyond what the natural meaning of the statute can support.

II. Ms. Crawford's answers to the interviewer's questions do not constitute protected "opposition" conduct. Ms. Crawford, her *amici*, and the Metropolitan Government have all invited the Court to consider various dictionary definitions of "oppose" or "opposition." The common thread in all these definitions is that the person doing the "opposing" has to communicate "resistance," or "hostile or contrary action."

Requiring a plaintiff ostensibly engaging in "opposition" conduct to actually communicate resistance mirrors the requirement that an employee take advantage of workplace procedures to actively report alleged discrimination, as set forth in *Faragher v. City of Boca Raton*, 524 U.S. 775, 806-07 (1998) and *Burlington Indus. v. Ellerth*, 524 U.S. 742, 764-65 (1998). Requiring the employee to communicate resistance to a perceived unlawful employment practice conforms with the employee's "obligation of reasonable care to avoid harm" articulated in *Faragher* and *Ellerth*. It is axiomatic that to avail oneself of the opposition clause, an employee actually has to "oppose" something.

The Sixth Circuit's use of terms such as "active" and "overt" was a legitimate attempt to describe the type of conduct protected by the opposition clause. An employee should be expected to take some affirmative steps to communicate resistance to sexual harassment in order to "oppose" it.

The concept of "opposition" inherently includes the notion that the employee's "opposition" is communicated to the individuals who allegedly retaliated against the employee. Pursuant to the Board of Education's anti-harassment policy, Ms. Crawford made her statements in the context of an investigation in which "[c]onfidentiality of employees shall be maintained, to the extent possible . . . ." At deposition, Ms. Crawford admitted she has no proof Veronica Frazier violated that confidentiality by communicating the substance of her statements to either Chris Henson or Dr. Garcia. JA 24-28. Ms. Crawford's statements do not constitute

"opposition" conduct since they were never communicated to the decision-makers.

III. The bulk of Ms. Crawford's brief, as well as those of her *amici*, consists of policy arguments in favor of an expansive interpretation of the term "investigation" in § 704(a). These policy arguments contain boundless speculation about employers' ability to subvert the integrity of their own harassment investigations if "investigation" is defined less expansively than Ms. Crawford suggests. Ms. Crawford cites an abundance of law firm client development material in support of her policy arguments.

The Court should decline the invitation to delve into the relative merits of policy goals and the best way to implement them. This is a function left to Congress, not the courts. While Ms. Crawford has articulated reasons for expanding the protections of the anti-retaliation provision of Title VII, there are equally persuasive policy arguments disfavoring such an expansive approach. The Court should decline to partake of the "temptations" inherent in the "statesmanship of policy-making," and leave that task to Congress.

IV. Any deference the Court may be inclined to afford the EEOC's policy pronouncements in its Compliance Manual and elsewhere should be tempered by the fact that the agency has already investigated the facts of this very case and determined that "there is not reasonable cause to believe that [Ms. Crawford's charge of retaliation] is true." 42 U.S.C. § 2000e-3.

A. Under Title VII, the EEOC has the authority to adopt "suitable procedural regulations" – but it lacks the authority to promulgate regulations addressing "substantive" issues under this Title. 42 U.S.C. § 2000e-12. Even if the Court gives "a measure of respect" to the agency's policy positions espoused by Ms. Crawford regarding the "participation" clause, there are countervailing statements of agency "policy" that negate the value of the policy statements upon which she relies.

B. In providing examples of protected "opposition" conduct, the EEOC repeatedly uses active verbs: "threatening" to file a charge or complaint; "complaining"; "protest[ing]"; "picketing"; "refusing" to obey an order; and "requesting" reasonable accommodation. All of these activities require initiative by the employee. None describe Ms. Crawford's act of answering questions in an interview. Even if the Court does grant the EEOC's policy statements "a measure of respect," close scrutiny of the agency's conflicting positions reveals the agency's policy statements are inconsistent at best.

V. The legislative branch is uniquely equipped to hold hearings, gather information, and weigh the relative merits of whether witnesses who participate in employers' internal harassment investigations should be entitled to protection under § 704(a). If the reach of § 704(a) is to be expanded to include employer-initiated investigations conducted prior to the filing of an EEOC charge, Congress should make that decision, not this Court.

Alternatively, Congress could broaden the EEOC's rule-making authority and enable it to adopt formal regulations regarding the reach of Title VII's anti-retaliation clause. As long as the EEOC's interpretations of the statutory provisions are reasonable in light of the statutory construction principles courts normally employ, its interpretations would receive more deference than the degree of deference to which its policy pronouncements are presently afforded.

Finally, the method of divining Congressional intent that is least likely to reflect considered policy judgments made after a period of information-gathering designed to achieve consensus is for this Court to resolve the issue. Through the means discussed above, both the legislative and executive branches are better suited to this task.

ARGUMENT

I. THE PLAIN MEANING OF § 704(a) IS THAT ONLY PARTICIPATION IN INVESTIGATIONS CONDUCTED PURSUANT TO AN EEOC CHARGE IS PROTECTED UNDER THE "PARTICIPATION" CLAUSE

The first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. If the statutory language is unambiguous and "the statutory scheme is coherent and consistent," the inquiry is over. *Robinson v. Shell Oil*

Co., 519 U.S. 337, 341 (1997); *quoting United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 240 (1989).

The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole. *Robinson*, 519 U.S. at 341; *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 477 (1992). Against this backdrop, the term "investigation" in § 704(a) of Title VII, 42 U.S.C. § 2000e-3(a), clearly refers only to investigations conducted after an EEOC charge is filed.[17]

A. THE WORDS SURROUNDING "INVESTIGATION" AND THE SEQUENCE OF THE TERMS USED REVEAL CONGRESS'S INTENT

Section 704(a) of Title VII makes it unlawful for an employer to discriminate against any employee:

> because he has opposed any practice made an unlawful practice by this title, or because he

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[17] Ms. Crawford points out that the codifiers used the word "subchapter" instead of "title" in § 704(a) when editing the text of the Civil Rights Act of 1964 for inclusion in the United States Code. This is true. However, Congress's choice of the word "title" actually strengthens the Metropolitan Government's argument that Congress intended the anti-retaliation protections of Title VII to extend only to investigations conducted after an EEOC charge was filed. When all the provisions of Title VII as enacted in 1964 are considered as a whole, it becomes even more plain that an "investigation . . . under this title" means one that occurs after the machinery of Title VII has been invoked through the filing of an EEOC charge. The Civil Rights Act of 1964 can be viewed at www.ourdocuments.gov.

> has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this title.

42 U.S.C. § 2000e-3(a). The operative words appearing near the term "investigation" shed light on the meaning of that term. For instance, Congress referred to making "a charge," as a way to participate in an activity under Title VII. The term "charge" clearly refers to an actual "charge" of discrimination, which has to contain – at a minimum – an allegation of discrimination, the name of the employer, and a request that the EEOC take remedial action to protect the employee's rights. *Fed. Express Corp. v. Holowecki*, 128 S.Ct. 1147, 1157-58 (2008). (Ms. Crawford's Charge of Discrimination appears at Cert. Br. Opp. App. 42-43.)

Similarly, Congress used the term "testified," the common meaning of which implies actually giving sworn testimony in some type of formal proceeding. As happened in this case, when witnesses are asked to be interviewed in connection with an employer's in-house sexual harassment investigation, they are not asked to "testify." They are not sworn. They are not subject to potential liability for perjury. They are simply interviewed.

The same logic applies to the use of the phrase "proceeding or hearing under this title." Participation in a "proceeding" or a "hearing" under this title implies a more formal process – like one conducted by the EEOC, or at least by an employer after an EEOC charge is filed – as opposed to the relative informality

of an employer's self-initiated sexual harassment investigation. In common parlance, the term "proceeding" would not be understood to refer to an employer's own internal sexual harassment investigation.

The same is true for the word "hearing." An employer's internal sexual harassment investigation bears no attributes of an administrative or judicial "hearing." There is no presiding officer, no "testimony" is taken, and nothing is adjudicated. The purpose of an internal sexual harassment investigation is to ferret out facts, which allows the investigator to draw conclusions based upon those facts. The investigator then submits factual findings and conclusions to the appropriate official charged with the authority to take appropriate action regarding the situation. This process does not resemble a "hearing" at all. Congress's choice of operative language surrounding the term "investigation" reveals that it means "investigations" conducted after an actual "charge" is made "under this title."

Finally, the sequence of Congress's phrasing is important. The statute protects an employee from retaliation when "he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing" under Title VII. 42 U.S.C. § 2000e-3(a). Sequentially, the phrasing first contemplates the actual filing of a "charge" of discrimination with the EEOC (by someone), and then the logical progression of what follows the filing of a charge – testifying, assisting, or participating in any manner in the investigation of that charge (by anyone),

which includes participation in a proceeding or hearing "under Title VII." Logically, after a charge is filed anyone may be asked to "testify," "assist," or otherwise "participate" in an investigation of that charge. The investigation may lead to a "proceeding" or "hearing" under Title VII.

Congress's phrasing was not accidental. The statute lays out the natural progression of events that may occur after an EEOC charge is filed. Ms. Crawford's proposed interpretation of the term "investigation" disrupts the logical meaning of the statute and places an "investigation" outside the context of the sequence of events Congress envisioned in § 704(a).

B. THE TERM INVESTIGATION, AT MOST, MEANS AN INVESTIGATION CONDUCTED AFTER AN EEOC CHARGE IS FILED

When considering the term "investigation" within the broader context of Title VII, it is significant that every time the term "investigation" or its derivative "investigate" appears, without exception, the context indicates that the statute is concerned with EEOC investigations. These terms are found in the sections of Title VII that establish the EEOC's power to conduct investigations of charges of unlawful employment practices.

For example, in 42 U.S.C. § 2000e-5(b), "investigation" clearly refers to an EEOC investigation:

> Whenever a charge is filed by . . . a person . . . alleging that an employer . . . has engaged

> in an unlawful employment practice the Commission . . . shall make an **investigation** thereof . . . . If the Commission determines after such **investigation** that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge. . . . If the Commission determines after such **investigation** that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice . . . .

42 U.S.C. § 2000e-5(b) (emphasis added). This language mandates that the EEOC shall investigate all charges of discrimination filed with it – by definition such an "investigation . . . under this title" will be an EEOC investigation.

Similarly, 42 U.S.C. § 2000e-5(f)(2) suggests that any "investigation" must be conducted by the EEOC, because that provision authorizes the EEOC to file suit, should its investigation suggest that such action is necessary:

> Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary **investigation** that prompt judicial action is necessary to carry out the purposes of this Act, the Commission . . . may bring an action. . . .

42 U.S.C. § 2000e-5(f)(2) (emphasis added). Because the EEOC uses the results of its investigation to determine

whether to file a lawsuit, the statutory language authorizing the EEOC to file suit contemplates that an EEOC investigation will precede such a lawsuit.

The EEOC's authority to conduct official investigations of allegedly unlawful discriminatory employment practices is set forth in 42 U.S.C. § 2000e-6(e). In that section, the term "investigate" appears as follows:

> [T]he Commission shall have authority to **investigate** and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission.

42 U.S.C. § 2000e-6(e) (emphasis added).

To facilitate the EEOC's investigatory role, 42 U.S.C. § 2000e-8(a) gives the EEOC broad access to evidence in conjunction with investigations, supporting the conclusion that it is responsible for conducting those investigations:

> In connection with any **investigation** of a charge filed under section 2000e-5 of this title, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful

> employment practices covered by this subchapter and is relevant to the charge under **investigation**.

42 U.S.C. § 2000e-8(a) (emphasis added).

The final mention of "investigations" occurs in § 2000e-9, which states:

> For the purpose of all hearings and **investigations** conducted by the Commission or its duly appointed agents or agencies, section 161 of Title 29 shall apply.[18]

42 U.S.C. § 2000e-9 (emphasis added).

The use of the term "investigations" in this last section is consistent with that of the other sections. In context, each time the term "investigation" appears it refers to an EEOC investigation after a charge has been filed.

Against this backdrop, Ms. Crawford argues for an interpretation of "investigation" to include employer-initiated investigations with no connection to the EEOC, and no connection to a pending EEOC charge. This would be an unwarranted expansion of the meaning of the term, divorcing it from its consistent meaning in Title VII.

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[18] 29 U.S.C. § 161 grants the EEOC identical powers to those of the National Labor Relations Board in compelling the appearance of witnesses and the production of evidence in its proceedings and investigations.

In contrast, the Sixth Circuit and the four other Circuit Courts of Appeal that have directly considered the issue have given the term "investigation" its correct meaning, one which more closely comports with Congressional intent: only after an EEOC charge has been filed does an employee's participation in an employer-initiated investigation become protected conduct. *See Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1313 (6th Cir. 1989); *Vasconcelos v. Meese*, 907 F.2d 111, 113 (9th Cir. 1990); *Brower v. Runyon*, 178 F.3d 1002, 1005-06 (8th Cir. 1999); *Byers v. Dallas Morning News*, 209 F.3d 419, 428 (5th Cir. 2000); *EEOC v. Total Sys. Servs., Inc.* 221 F.3d 1171, 1174 (11th Cir. 2000); *Abbott v. Crown Motor Co., Inc.*, 348 F.3d 537, 543 (6th Cir. 2003).

Taken literally, the context of the term "investigation" in Title VII arguably indicates only participation in EEOC investigations is protected under the statute. These five circuits have already taken an expansive approach to defining the term, making the "machinery of Title VII available" to a much larger group of individuals, by extending its coverage to investigations conducted by employers, as long as an EEOC charge was filed first. Ms. Crawford and her *amici* argue for a further extension of the concept of "investigations," an interpretation that dramatically departs from the context in which the term is used in Title VII. This departure is unwarranted.

The use of the terms "investigation" and "investigate" is consistent throughout Title VII. Interpreting "investigation" in § 704(a) in harmony with its meaning in the other sections of Title VII results in

the statutory language being unambiguous and "the statutory scheme [being] coherent and consistent." *Robinson*, 519 U.S. at 340; *quoting Ron Pair Enter., Inc.*, 489 U.S. at 240. Statutes are to be read as a whole. *United States v. Morton*, 467 U.S. 822, 828 (1984). Identical words within a statute should be construed *in pari materia*. *Pasquantino v. United States*, 544 U.S. 349, 355 n.2 (2005).

The Court's inquiry should end here. *Robinson*, 519 U.S. at 340. Ms. Crawford's act of answering questions in an internal sexual harassment investigation – neither an EEOC investigation nor an investigation pursuant to an EEOC charge – is not covered under Title VII's "participation" clause.

II. MS. CRAWFORD'S ACTIONS ARE NOT COVERED UNDER THE "OPPOSITION" CLAUSE

Ms. Crawford and her *amici* ask the Court to embrace a definition of "opposition" conduct that warps the meaning of the term and renders the "participation" clause superfluous. Under Ms. Crawford's paradigm, there would be no need for the participation clause because "opposition" would be defined so broadly as to include the most casual conversation between a potential plaintiff and another.

This Court has not had occasion to directly consider the quality or quantity of an individual's conduct which may qualify for protection under the "opposition" clause. However, in *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 269-74 (2001) (per curiam), plaintiff invoked

Title VII's anti-retaliation provisions under both the "opposition" and "participation" clauses.

In *Breeden*, plaintiff's supervisor and one of plaintiff's male co-workers had what plaintiff considered to be an inappropriate verbal exchange in her presence. This exchange involved a comment in an employment application. *Id.* at 269-70. Ms. Breeden contended that her (presumably verbal) complaints to her supervisor, to her supervisor's supervisor (an assistant superintendent), and to another assistant superintendent of the school district constituted protected "opposition" conduct, even though no EEOC charge had been filed. This Court expressed skepticism that Ms. Breeden's complaints to these three supervisors constituted protected "opposition" activity. *Id.* at 270. However, the Court had no occasion to rule on the propriety of the Ninth Circuit's finding in this regard, holding instead that no one reasonably could believe the incident violated Title VII. *Id.*

In dicta, the Court dismissed Ms. Breeden's "utterly implausible" suggestion that the EEOC's issuance of a right to sue letter – an action in which the employee takes no part – was a protected activity under 42 U.S.C. § 2000e-3(a). *Id.* at 273. The Court also discussed the lack of evidence indicating the decision-maker knew of the existence of Ms. Breeden's right to sue letter. *Id.* The Court dismissed Ms. Breeden's temporal proximity argument, specifically citing to cases in which periods of three and four months between the alleged protected

activity and the adverse action were deemed insufficiently close to infer causation. *Id.* at 273-74.[19]

The difference between Ms. Breeden and Ms. Crawford is that Ms. Breeden actually did something – she sought out three supervisors and made complaints. These affirmative steps would constitute protected "opposition" if they reflected the employee's reasonable and good faith opposition to an employment practice made unlawful by Title VII. Ms. Crawford never took such affirmative steps.

Turning to the plain meaning of the word, to "oppose" something is "to place over against something so as to provide resistance, counterbalance or contrast; to place opposite or against something; to offer resistance to." Merriam-Webster Online Dictionary (2008 ed.). Among the definitions of "opposition" is "hostile or contrary action or condition." *Id.* The common thread in these definitions is the person doing the "opposing" has to actually communicate "resistance" or "hostile or contrary action."

Requiring a plaintiff ostensibly engaging in "opposition" conduct to actually communicate resistance mirrors the requirement that an employee take advantage of workplace procedures to actively report alleged discrimination, as set forth in *Faragher*, 524 U.S. at 806-07 and *Ellerth*, 524 U.S. at 764-65. In *Faragher*, this Court noted that the "primary objective" of Title

[19] In Ms. Crawford's case, four and a half months passed from the date of her statement to Veronica Frazier (July 22, 2002) and her charge letter from Chris Henson (December 4, 2002). Br. Opp. Cert. App. 20.

VII is not to provide redress but to avoid harm in the first place. *Id.* at 806. To that end, Title VII encourages employers to establish a complaint procedure "designed to encourage victims of harassment to come forward . . ." to let their complaints be known. *Id.* The Court also recognized that a perceived victim of discrimination has a duty "to use such means as are reasonable under the circumstances to avoid or minimize the damages" that result from violations of the statute. *Id.* (internal citations omitted). Accordingly, the Court crafted the two-part affirmative defense now applicable in supervisory hostile work environment cases based in part on the recognition of the employee's "corresponding obligation of reasonable care to avoid harm." *Id.* at 807; *Ellerth*, 524 U.S. at 765.[20]

Requiring the employee to actually initiate a complaint to "oppose" an allegedly unlawful workplace practice conforms with the employee's "obligation of reasonable care to avoid harm" articulated in *Faragher* and *Ellerth*. It is axiomatic that to avail oneself of the opposition clause, an employee has to actually "oppose" something.[21]

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[20] Contrary to Ms. Crawford's assertions, the implementation of anti-harassment policies containing complaint procedures remains a voluntary activity. While such policies may go a long way towards establishing an employer's defense to a sexual harassment claim, employers are not legally mandated to implement them. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

[21] The value of *Faragher* and *Ellerth* to the instant case is the Court's articulation of the employee's affirmative duty to

(Cont'd)

The Court again acknowledged the importance of the employee's obligation to come forward with complaints of perceived sexual harassment or discrimination in *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S.Ct. 2405, 2414 (2006). In *White*, the Court interpreted the anti-retaliation provision of § 704(a) to prohibit employer actions that are likely "to deter victims of discrimination from complaining to the EEOC," the courts, and their employers. 126 S.Ct. at 2414 (quoting *Robinson*, 519 U.S. at 346). Significantly, Ms. White made a (presumably verbal) complaint to Burlington officials about repeated discriminatory comments made by her immediate supervisor, and within a month she had filed a charge with the EEOC. *White*, 126 S.Ct. at 2409. There was never any question that her initial, verbal complaint was treated as "opposition" conduct.

"Opposition" conduct includes making informal protests of discriminatory employment practices, making complaints to management, writing critical letters to customers, protesting against discrimination

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report sexual harassment. The acknowledgement of this obligation is crucial in deciding whether Ms. Crawford acted to "oppose" unlawful employment practices. However, Ms. Crawford's case is not directly governed by *Faragher* and *Ellerth* because: (1) Gene Hughes was not Ms. Crawford's supervisor; and (2) this is a retaliation case – *Faragher* and *Ellerth* were sexual harassment cases (Ms. Crawford never complained of sexual harassment in her EEOC charge and her sexual harassment claim in this case was dismissed as a result). JA 71, 95; Cert. Br. Opp. App. 42; Record, 23, 24, Memorandum and Order granting Motion for Partial Dismissal.

by industry or society in general, and expressing support for co-workers who have filed formal charges. *Curay-Cramer v. Ursuline Acad. of Wilmington, Delaware, Inc.*, 450 F.3d 130, 135 (3rd Cir. 2006).[22]

In contrast, Ms. Crawford complained to no one. She did not complain to her boss (Bob Bohnensteil), Mr. Bohnensteil's boss (John Dietz), or the Board of Education's Assistant Superintendent for Human Resources, Graciella Escobedo (a woman). Cert. Br. Opp. App. 1-2.

The Sixth Circuit's point was that it takes more than merely being in a re-active mode to put an employer on notice that an employee "opposes" an unlawful employment practice. An employee should be expected to take some affirmative steps to communicate opposition to sexual harassment to be considered to have "opposed" it. The Sixth Circuit was justified in using the terms "active" and "overt" to describe what is required for "opposition" conduct.

A key problem with treating Ms. Crawford's statements during her interview as "opposition" conduct is that her statements were made during an investigation in which the specific information furnished by each witness was kept confidential. The Fact Finding Report identifies the witnesses interviewed, but it is careful not to link the substance of any witness's statement with the identity of that witness. Cert. Br. Opp. App. 8–17. During her deposition, Veronica Frazier

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[22] Additional authorities describing opposition conduct are discussed at Cert. Br. Opp. 9.

testified this is by design, to maintain the integrity of the investigative process. JA 35-36. During interviews with witnesses, she does not disclose what other witnesses already have told her. *Id.* Ms. Frazier intentionally drafted the summary of witness statements in the Fact Finding Report to not reveal the witness's identities. Cert. Br. Opp. App. 9-14.

Ms. Frazier's investigative techniques comport with the Metropolitan Nashville Board of Public Education's Employee Harassment Policy, no. 3726, found at http://www.mnps.org/AssetFactory.aspx?did=3531. This policy, originally approved in 1992, states that during an investigation of employee to employee harassment, "[c]onfidentiality of employees shall be maintained, to the extent possible. . . ."[23]

It is difficult to treat Ms. Crawford's statements as "opposition" conduct because the concept of "opposition" inherently includes the notion that the employee's "opposition" is communicated to the individuals who allegedly retaliated against the employee. Here, Ms. Crawford's statements were made in the context of an investigation in which "[c]onfidentiality of employees shall be maintained, to the extent possible. . . ." During her deposition,

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[23] Ms. Frazier's investigative techniques also comply with the EEOC's recommended confidentiality procedures governing such investigations. Enforcement Guidance, 2 EEOC Compl. Man. (BNA) Pt. V(C)(1), at 615:0107 and Pt. V(C)(1)(d) at 615:0109 (Oct. 2002). The rationale for providing "confidentiality . . . to the extent possible," is presumably to minimize the likelihood of retaliation for participating in an investigation.

Ms. Crawford admitted she has no proof Veronica Frazier violated that confidentiality by communicating the substance of her statements to either Chris Henson or Dr. Garcia. JA 24-28.[24] Ms. Frazier herself indicated the importance of "keep[ing] names out of it" in an effort to "maintain the integrity of the investigative process." JA 36. If the Court were to adopt Ms. Crawford's definition of "opposition" conduct, it will allow employers to be "ambushed" by employees claiming retaliation based on "opposition" conduct occurring during an interview in which confidentiality was promised and delivered. That is exactly what happened here.

III. THE COURT SHOULD DECLINE TO EVALUATE THE WISDOM OF CONGRESS'S POLICY DECISIONS

The bulk of Ms. Crawford's brief, as well as those of her *amici*, consists of policy arguments in favor of an expansive interpretation of § 704(a), in which the term "investigation" would be construed to cover internal sexual harassment investigations undertaken by employers with no connection to an EEOC charge

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[24] Evidence that her statements were communicated to the decision-makers is an essential element of her claim. Ms. Crawford's admission that she has no proof in this regard is fatal to her case at the summary judgment stage. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986). Ms. Crawford presents the same evidentiary vacuum as her former colleague, Ms. Proffitt. *Proffitt*, 2005 WL 2446006, at *3. In fact, Ms. Crawford must rely on the same deposition testimony as did Ms. Proffitt, because all witnesses in both cases were deposed only once (at Ms. Crawford's and Ms. Proffitt's counsel's request) and the same depositions were used in both cases.

whatsoever. These arguments reflect a jaundiced view of employer-employee relations. Specifically, these arguments rest on speculative assertions about the types of "incentives" employers might have to subvert the integrity of their own investigations if § 704(a) is not interpreted as expansively as Ms. Crawford advocates. However, this Court has repeatedly recognized that weighing the relative merits of policy goals, and the best way to implement them, is a function left to Congress, not the courts. This Court should not second-guess the wisdom of Congress's actions. *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003); *Felder v. Casey*, 487 U.S. 131, 149 (1988); *Buckley v. Valeo*, 424 U.S. 1, 83 (1976).

It may be sound policy to extend the protections of the anti-retaliation provision of § 704(a) to participants in internal sexual harassment investigations. Congress has that prerogative. However, the clear meaning of that section as presently worded, and the fact that, without exception, every time "investigate" or "investigation" is used in Title VII it refers to an EEOC investigation, confirms that extending protection to employers' internal investigations is not the result Congress intended. Interpreting "investigation" in § 704(a) consistently with its use in the rest of the statute, it is clear that when Title VII was enacted in 1964 Congress intended the anti-retaliation provision to cover (at most) participation in investigations after an EEOC charge is filed.

There are policy reasons why Congress may have chosen to limit the anti-retaliation provision's reach to participation in EEOC investigations, reasons that are

just as valid as the reasons articulated by Ms. Crawford. As the Sixth Circuit stated, in enacting Title VII, Congress may have thought that its impact on employers was onerous enough already, and it may not have wanted to burden employers with a new class of potential retaliation plaintiffs – those who participate in internal investigations. Cert. Pet. App. 10(a). By protecting only participation in investigations that occur relative to EEOC proceedings, Congress may have wanted to keep the burden of Title VII from falling on an employer who proactively chooses to launch an internal investigation. *Id.*

Congress could have believed that including internal, employer-initiated investigations under the participation clause would "chill" an employer's willingness to conduct such investigations. Congress also could have felt that the risk that employers would retaliate against employees who cooperate in internal investigations was minimal.

This last point appears to have been proven true through the years. Since 1989, the principle that § 704(a) applies only to participation in investigations conducted after an EEOC charge has been filed has been the law in the Sixth Circuit. *Booker*, 879 F.2d at 1313. In 1990, the Ninth Circuit followed suit in *Vasconcelos*. 907 F.2d at 113. In 1999 and 2000, the Eighth, Fifth, and Eleventh Circuits, respectively, reached the same conclusion. *Brower*, 178 F.3d at 1005-06; *Byers*, 209 F.3d at 428; *Total Sys. Servs, Inc.* 221 F.3d at 1174.[25]

[25] Ms. Crawford and her *amici* portray the Sixth Circuit as a "renegade" in subscribing to this principle, but as these cases demonstrate, this has been the law in these other four circuits for a number of years.

Ms. Crawford points to no evidence – empirical or anecdotal – indicating that employers in these five judicial circuits have embarked upon campaigns to retaliate against participants in internal investigations. Since 1989, the law as stated by the Sixth Circuit has been the law in wide swaths of the country, yet there are no reports of increased retaliation against participants in internal investigations in these circuits. There is no evidence the "foreboding scenario" envisioned by Ms. Crawford has come to pass. Cert. Pet. App. 9a. As the Sixth Circuit noted, a purported practice or policy of retaliating against individuals who participate in internal sexual harassment investigations would be inherently unreasonable, thus precluding the employer's reliance on the *Faragher/Ellerth* affirmative defense in sexual harassment cases. *Id.*

Respectfully, even if the Court disagrees with Congress's choice to limit the reach of § 704(a) to participation in investigations after an EEOC charge is filed, it should not second-guess Congress's policy choices in this regard. "Whatever temptations the statesmanship of policy-making might wisely suggest," the judiciary's role is to construe the statute – not make it better. *Jones v. Bock*, 127 S.Ct. 910, 921 (2007) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 533 (1947)).

IV. ANY DEFERENCE ACCORDED TO THE EEOC'S COMPLIANCE MANUAL IS UNDERCUT BY ITS PRIOR DISMISSAL OF MS. CRAWFORD'S RETALIATION CLAIM

When engaging in statutory construction, courts only consider agency guidelines and policy interpretations if the words of a statute are ambiguous. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984). As set forth in section I, the meaning of the term "investigation" in § 704(a) is clear. There is no need to look any further than the language of Title VII itself to determine Congress's intent on the dispositive issue in this case. However, should the Court accept Ms. Crawford's and the United States's invitation to examine EEOC policy pronouncements to ascertain the meaning of this purportedly ambiguous term, any discussion of the "deference" to be accorded to the EEOC's policy statements must be tempered by the fact that in this very case, the agency has already determined that "there is no[] reasonable cause to believe that [Ms. Crawford's charge of retaliation] is true." 42 U.S.C. § 2000e-5(b); Cert. Br. Opp. App. 45.

A. "PARTICIPATION"

In enacting Title VII, Congress only conferred upon the EEOC the authority to adopt "suitable procedural regulations" – the agency lacks the authority to promulgate regulations addressing "substantive" issues under this Title. 42 U.S.C. § 2000e-12(a); *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 113 (2002); *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 257 (1991) (superceded by statute on unrelated grounds);

Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 141 (1976) (superceded by statute on unrelated grounds). For the purposes of this case, however, the Metropolitan Government will assume that the EEOC's policy statements contained in its Compliance Manual and elsewhere are at least "entitled to a 'measure of respect'" by this Court under the lesser deference standard set forth in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), as opposed to the more deferential standard articulated in *Chevron. Holowecki*, 128 S.Ct. at 1156; *see Chevron*, 467 U.S. at 843-45.

EEOC policy pronouncements that touch on issues in this case are many and varied. Ms. Crawford and the United States point to some of them in their briefs. They fail, however, to cite to the Compliance Manual where the EEOC defines "participation" as "individuals challenging employment discrimination under the statues enforced by EEOC *in EEOC proceedings, state administrative or court proceedings, as well as in federal court proceedings, and to individuals who testify or otherwise participate in such proceedings.*" Compl. Man., *Section 8-II(C)(1), Retaliation*, (May 20, 1998) (http.www.eeoc.gov/policy/docs/retal.html) (emphasis added). The agency notes that in the federal sector, once an employee **initiates** contact with an EEO counselor, [s]he is engaging in "participation." *Id.* (emphasis added). Significantly, there is no mention of employers' own internal investigations in this definition of "participation."

Likewise, subsection 8-II(C)(2) of the Compliance Manual states, in pertinent part:

> While the opposition clause applies only to those who protest practices that they

> reasonably and in good faith believe are unlawful, the participation clause applies to all individuals who participate in the **statutory** complaint process.

Id. (emphasis added). The reference to the "statutory" complaint process in the EEOC's own Compliance Manual indicates an intent to exclude an employer-initiated internal investigation from the ambit of the "participation" clause.

B. "OPPOSITION" CONDUCT

Similarly, in providing examples of "opposition" conduct, the EEOC repeatedly uses active verbs: "threatening" to file a charge or complaint; "complaining"; "protest[ing]"; "picketing"; "refusing" to obey an order; and "requesting" reasonable accommodation. Compl. Man., *Section 8-II(B)(2), Retaliation*, (May 20, 1998) (http.www.eeoc.gov/policy/docs/retal.html). All of these activities require initiative by the employee. None of them describe Ms. Crawford's act of answering questions during an interview.

In short, § 704(a) is not ambiguous. However, if the Court determines that it is, and if the Court turns to the EEOC for guidance, the Court should cast a discerning eye on any statements of agency policy, in light of the EEOC's specific finding in this case that "there is no[] reasonable cause to believe [Ms. Crawford's charge of retaliation] is true." Even if the Court does grant the EEOC's policy statements "a measure of respect" under the less deferential *Skidmore* standard, when the portions of its Compliance Manual cited above are compared with the sections upon which

Ms. Crawford and the Unites States rely, the EEOC's policy statements are inconsistent at best.

V. IF THE COURT FINDS CONGRESS'S INTENT UNCLEAR, THE COURT SHOULD ALLOW CONGRESS TO CLARIFY IT

The most effective way to resolve any perceived ambiguity in § 704(a) is to let Congress speak to the issue. The legislative branch is uniquely equipped to hold hearings, gather information, and weigh the relative merits of whether witnesses who participate in employers' internal harassment investigations should be entitled to protection under § 704(a). *Holowecki*, 128 S.Ct. at 1158.

Another option would be for Congress to broaden the EEOC's rule-making authority and enable it to adopt formal regulations regarding the reach of Title VII's anti-retaliation clause. Broadening the EEOC's power to include substantive rule-making under Title VII would allow its duly enacted regulations – after the attendant period of public comment and information gathering – to be given a higher degree of deference than is presently afforded EEOC policy pronouncements. As long as the EEOC enacted reasonable interpretations of the statutory provisions in light of the statutory construction principles courts normally employ, its interpretations would receive more deference than the degree of deference to which its policy pronouncements presently are afforded. *Id.*; *Arabian American Oil*, 499 U.S. at 260.

The method of divining Congressional intent that is least likely to reflect considered policy judgments made after a period of information-gathering designed to achieve consensus is for this Court to resolve the issue. Ms. Crawford and her *amici* urge the Court to resolve the issue in the context of this lawsuit because it is the path of least resistance. If the Court finds the statute ambiguous, the nature of the dispute and the paucity of legislative history on § 704(a) make ascertaining Congress's intent a tricky proposition. *Hochstadt v. Worcester Found. for Exper. Biology*, 545 F.2d 222, 230 (1st Cir. 1976); *Green v. McDonnell Douglas Corp.*, 463 F.2d 337, 341 (8th Cir. 1972). Either the legislative or executive branch, through the means discussed above, is better suited to resolve any perceived ambiguity.

CONCLUSION

The "participation" clause provides broad protection in a limited number of forums. The "opposition" clause offers narrower protection in a broad array of forums. Ms. Crawford is asking the Court to expand "protected activity" to include a broad range of activities in a broad set of forums. But that is not the law Congress enacted.

For the foregoing reasons, this Court should affirm the judgment of the United States Court of Appeals for the Sixth Circuit.

Alternatively, the Metropolitan Government asks the Court to dismiss this case on the ground that *certiorari* was improvidently granted. Given the more thorough illumination of the facts which is now before the Court, the Court should remand the case to the District Court to rule on the two grounds for summary judgment that Court has yet to consider: (1) Ms. Crawford admittedly has no evidence the decision-makers knew what she allegedly told Veronica Frazier; and (2) assuming *arguendo* Ms. Crawford could state a *prima facie* case, there were legitimate, non-discriminatory business reasons to terminate her employment, which were not pretextual. This would negate the need for this Court to resolve the issue raised in this case.

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No. 06-1595

In the Supreme Court of the United States

VICKY S. CRAWFORD,

Petitioner,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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I. PETITIONER'S CONDUCT WAS PROTECTED BY THE PARTICIPATION CLAUSE OF SECTION 704(a)

As we explained in our opening brief, an employer's investigation and internal procedures to prevent or correct discrimination are an essential part of the machinery for implementing Title VII. See *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998). Nothing in respondent's brief warrants denying the protections of the participation clause to workers who utilize those important employer-created mechanisms, or encouraging employees to bypass those mechanisms because only resort to the EEOC itself is so protected.

Respondent asserts that the interpretation of the participation clause advanced by Crawford and the United States conflicts with the "clear"[1], "plain"[2], and "unambiguous"[3] language of that provision. The threshold problem with this contention is that respondent cannot decide what that assertedly "clear" contrary meaning is.

On several occasions respondent asserts that the term "investigation" in section 704(a) refers exclusively to an investigation by the EEOC.

> [T]he fact that, without exception, every time "investigate" or "investigation" is used in Title

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[1] R.Br. 33, 36.

[2] R.Br. 16.

[3] R.Br. 25.

> VII it refers to an EEOC investigation, confirms that extending protection to employers' internal investigations is not the result Congress intended. . . . There are policy reasons why Congress may have chosen to limit the anti-retaliation provision's reason to participation in EEOC investigations.

(R.Br. 33).[4] Other passages in respondent's brief, however, state that "investigation" in section 704(a) refers to any investigation, including an investigation by an employer itself, so long as the investigation is "after"[5] "relative to"[6], "pursuant to"[7], "trigger[ed]" by[8], has a "connection to"[9], or "follow[s]"[10] an EEOC charge. Elsewhere in its brief respondent simply declines to take a position as to whether or not the "clear" language of section 704(a) is limited to

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[4] See R.Br. 12 ("The most significant indicia of Congress's intent is that every time the words 'investigation' or 'investigate' appear in Title VII, without exception, they refer to an investigation actually conducted by the EEOC"), 20 (every use of those terms in Title VII is "concerned with EEOC investigations.")

[5] R.Br. 11, 19, 20, 24, 35.

[6] R.Br. 34.

[7] R.Br. 16, 25.

[8] R.Br. 12.

[9] R.Br. 23, 32.

[10] R.Br. 12.

investigations by the EEOC.[11] And respondent agrees that "proceeding . . . under this title" can apply to an employer's own corrective mechanisms, objecting only that this clause is limited to employer internal procedures that occur subsequent to the filing of an EEOC charge. (R.Br. 18-19).

Respondent suggests that "investigation" in section 704(a) must mean investigation by the EEOC because in each of the other provisions of Title VII in which the term "investigation" appears it is expressly limited to an investigation of a charge by the EEOC. (R.Br. 17-19). But as the government has observed, this analysis is precisely backwards. (U.S.Br. 16-17). Because Congress in the other provisions of Title VII did expressly qualify "investigation" so that it referred only to an EEOC investigation of a charge, the absence of that restriction in section 704(a) itself indicates that the same limitation is not applicable to that provision.

The method of interpretation proposed by respondent would lead to a number of implausible results. It would mean, for example, that the participation clause would not apply to an investigation by a state or local equal employment agency, even though Title VII plaintiffs are required to complain to those agencies before filing a Title VII

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[11] R.Br. 24 ("Taken literally, the context of the term 'investigation' in Title VII *arguably* indicates only participation in EEOC investigations is protected under the statute")(emphasis added), 33 ("when Title VII was enacted in 1964 Congress intended the anti-retaliation provision to cover (*at most*) participation in investigations after an EEOC charge is filed")(emphasis added).

charge. Under section 706, in any state or political subdivision which has its own law or ordinance forbidding discrimination, an aggrieved individual cannot file a charge with EEOC without first complaining to the appropriate state or local authority. 42 U.S.C. § 2000e-5. The EEOC in turn is required to give "substantial weight" to determinations by those authorities. 42 U.S.C. § 2000e-5(b). But if the meaning of "investigation" in section 704(a) is "EEOC investigation"[12], an investigation by state and local authorities would not be protected by the participation clause, even though an aggrieved party is required to seek redress from those authorities, and despite the fact that the EEOC is directed to give weight to the results of those state and local investigations.

On the other hand, under the method of interpretation proposed by respondent, "proceeding" would include actions by those state and local agencies but not events at the EEOC itself. In the provisions of Title VII other than section 704(a), the term "proceeding" is used only to refer to state and local proceedings and to judicial proceedings, but never to actions at or within the EEOC.[13] If the proceeding clause in section 704(a) covers only actions characterized as proceedings elsewhere in Title VII, the proceeding clause would not apply, for example, to

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[12] On respondent's view that would especially true because such a state or local investigation would often occur before the filing of an EEOC charge.

[13] 42 U.S.C. §§ 2000e-5(b), 2000e-5(c), 2000e-5(d), 2000e-5(e)(1), 2000e-5(f)(1), 2000e-(f)(2), 2000e-5(k), 2000e-6(b), 2000e-6(d), 2000e-8(d).

EEOC conciliation proceedings. An employer could fire a worker for rejecting a proposed settlement offer, or for being insufficiently conciliatory in tone during the negotiations. The meaning of "testify" in section 704(a) would be entirely unclear, since it appears only in that particular provision of Title VII. And the phrase "under this title" would mean different things depending on which noun (e.g. investigation or proceeding) it modified.

Respondent's proposed method of interpretation would also exclude from protection by the participation clause a number of different types investigations conducted by the federal government itself in enforcing Title VII. If "investigation" in section 704(a) means "EEOC investigation", it would not apply to investigations by the Department of Justice. The Department of Justice would ordinarily investigate alleged violations of the three criminal provisions of Title VII.[14] The Department would also conduct its own investigations prior to filing suit under Title VII against a state or local government. 42 U.S.C. § 2000e-5(f)(1).[15] In addition, in the provisions of Title

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[14] 42 U.S.C. §§ 2000e-8(e)(unlawful disclosure of certain information), 2000e-10(b)(unlawful failure to post notices), 2000e-13(forcibly resisting EEOC officials).

[15] Under Title VII as originally enacted the Department of Justice was responsible for filing any federal pattern and practice action; its authority to do so did not depend on any person having filed a charge with the EEOC. 42 U.S.C. § 2000e-6(a). On respondent's interpretation of section 704(a), Justice Department investigations in these cases would also have been outside the scope of the participation clause.

VII relied on by respondent the term "investigate" is used to refer, not to any investigation by EEOC, but only to an EEOC investigation of a charge. (R.Br. 20-23). But under Title VII EEOC investigates matters which are not violations of section 703 or 704 and therefore would not be the subject of a charge; the EEOC, for example, might conduct an investigation into whether an employer had failed to post the notices required by Title VII, 42 U.S.C. § 2000e-10(a), or in order to respond to an action by an employer or union challenging an EEOC record keeping requirement. 42 U.S.C. § 2000e-8(c).

Respondent contends that the term "investigation" (and, presumably, the term "proceeding") in section 704(a) cannot refer to events that occur *before* the filing of an EEOC charge because the term "investigation" appears later in section 704(a) than do the words "made a charge." But the word "testified" also precedes in section 704(a) the word "investigation," even though federal testimony would only occur in court, after the EEOC investigation. If complaints to and actions by state and local authorities are covered by the participation clause, that would have to be under the terms "proceeding" or "hearing", words which also appear after "charge" and "investigation"; yet those complaints and actions ordinarily occur before either the filing of an EEOC charge or the conduct of an EEOC investigation.

Respondent's textual argument misapprehends the syntactical structure of the portion of section 704(a) in question. The participation clause lists four actions ("ma[king] a charge," "testifly]," "assist[ing]" and "participat[ing]") subject to a common modifying

phrase ("in an investigation, proceeding or hearing under this title"). That phrase necessarily modifies each of the actions, not merely "participated." "Assisted" would be meaningless without that modifying phrase explaining assistance to whom or to what. In the absence of that modifying phrase, "testified" would conceivably refer to any type of testimony in a federal forum. Correctly understood, this is not a sentence in which Congress listed "investigat[e]" in some quasi-chronological order after "made a charge", but simply used the common syntactical device of placing a phrase (including the terms investigation and proceeding) modifying all elements on a list at the end of the list itself.[16]

If the investigation clause of section 704(a) applies solely to investigations by EEOC itself, it would only protect witnesses when they were making statements to the Commission or its employees. That would leave a potential defendant free in the wake of an EEOC charge to launch its own internal inquiry and then dismiss or threaten any witness who gave an unfavorable statement to the employer, or who simply refused to talk. Some of those victims might be protected by the opposition clause, but certainly not all. (See Pet. Br. 35-38). On the other hand, if the investigation (and proceeding) clause applies only to an employer investigation that occurs after the filing of an EEOC charge, any number of paradoxical consequences would follow. An employee would be

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[16] In a phrase like "striking out, grounding out, or getting a hit in a World Series game," the listed batter actions do not occur *before* the World Series.

unprotected in a case in which both the worker and the retaliating supervisor believed, mistakenly, that a charge was pending. Retaliation, on the other hand, would be unlawful even where no one involved had any idea that there was such a charge. A worker would usually have no way of knowing whether his or her actions were protected by the participation clause by reason of the pendency of some other employee's (or perhaps a commissioner's) charge.

Respondent acknowledges that "proceeding" is not limited to actions by the EEOC itself. It argues, however, that with regard to an employer the term "proceeding" refers only to the "more formal process . . . by an employer after an EEOC charge is filed," but not to "the relative informality of an employer's self-initiated sexual harassment investigation." (R.Br. 18-19). There is, however, no reason to assume that an employer's pre-charge process would be less structured than the employer's response to an EEOC charge. To the contrary, employer internal proceedings are often highly structured. See, e.g., *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006)(evidentiary hearing with witnesses held before company official; process entitled "formal investigation"[17]); *University of Tennessee v. Elliott*, 478 U.S. 788, 791 (1986)(hearing before administrative law judge lasting five months with testimony by 100 witnesses); *Alexander v. Gardner-Denver*, 415 U.S. 36, 41 (1974)(arbitration hearing). Conversely, once a Title VII charge is filed, an employer is likely to treat the matter is it would any potential lawsuit, avoiding

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[17] See Brief for Petitioner, p. 3.

contact with the employee about the subject of the charge, and assessing that charge in a confidential manner.

Section 706(c) utilizes the term "proceeding" to refer to actions by state or local authorities with regard to a possible unlawful employment practice when two circumstances are present: there is a "state or local law prohibiting the unlawful employment practice alleged" and those authorities are "authoriz[ed] . . . to grant or seek relief from such practice." 42 U.S.C. § 2000e-5(c). This characterization does not depend in any way on the formality of those state or local agency actions. Under section 706(c) a prosecutor's decision whether to "institute criminal proceedings" regarding alleged employment discrimination would constitute a "proceeding," even though that decision would often be quite informal.

Section 706(c) provides an appropriate standard for defining the term "proceeding" in other contexts. Where an employer has adopted a prohibition against a type of discriminatory conduct that is unlawful under Title VII, forbidden by Title VII (including by incorporating Title VII into the standards which the employer enforces), and has given its personnel or other supervisory officials the power to "grant or seek relief", the actions of those officials in dealing with a violation of that internal prohibition can fairly be deemed a "proceeding" under Title VII.

In this Court, the lower courts, and materials posted on its website the EEOC has taken the position that the participation clause protects involvement in

an employer's internal remedial process. Respondent contends that this position is inconsistent with the interpretation of the participation clause set out in the Commission's Compliance Manual. Each of the passages in that Manual cited by respondent, however, purports only to set out examples of what is covered by the participation clause, not to provide an exclusive list.[18]

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[18] For example, section 8-II(C)(1) states with regard to the participation clause:

> This protection applies to individuals challenging employment discrimination under the statutes enforced by EEOC in EEOC proceedings, state administrative or court proceedings, as well as in federal court proceedings, and to individuals who testify or otherwise participate in such proceedings.

Respondent, in quoting this sentence, deletes the first four words, and substitutes "[in] the Compliance Manual . . . the EEOC defines 'participation' as." (R.Br. 37). This rephrasing converts a non-exclusive list of applications into a definition. This illustrative list omits some actions which undeniably are covered by the participation clause; it contains no mention, for example, of the protections for "assist[ance]" or participation in an investigation. Section 8-II(C)(2), also quoted by respondent, states in pertinent part:

> While the opposition clause applies only to those who protest practices that they reasonably and in good faith believe are unlawful, the participation clause applies to all individuals who participate in the statutory complaint process.

(See R.Br. 37-38). This listing too is clearly not meant to be exclusive; it contains, for example, no mention of the judicial process (lawsuits would not normally be described as a "complaint process") or of providing "assist[ance]" to those involved in either administrative or judicial proceedings.

Respondent asserts that the deference otherwise due to the Commission's interpretation of section 704(a)

> must be tempered by the fact that in this very case, the agency has already determined that "there is no[] reasonable cause to believe that [Ms. Crawford's charge of retaliation] is true." 42 U.S.C. § 2000e-5(b); Cert. Br. Opp. App. 45.

(Br. Opp. 36). But what respondent is quoting is not the language of the EEOC determination in this case, but a passage from section 2000e-5(b). The actual EEOC determination is simply inconclusive:

> Based upon its investigation, the EEOC is unable to conclude that the information obtained establishes violations of the statutes. This *does not certify* that the respondent is in compliance with the statutes.

(Br. Opp. App. 45)(Emphasis added).

Section 8-II(C)(1) states:

> In the federal sector, once a federal employee initiates contact with an EEO counsellor, (s)he is engaging in "participation."

(See R. Br. 37). But this assuredly does not mean that in the federal sector the participation clause protects only those who "initiate[] contact with an EEO counsellor." That would omit, for example, testimony by most witnesses in administrative hearings, depositions, or federal court.

II. PETITIONER'S CONDUCT WAS PROTECTED BY THE OPPOSITION CLAUSE OF SECTION 704(a)

Respondent offers a variety of interpretations of the opposition clause, none of which provides a basis for dismissing petitioner's opposition clause claim.

Respondent urges that to be protected by the opposition clause an employee's actions must constitute "resistance" to the alleged discrimination. (R.Br. 27). But section 704(a) is not limited to the types of opposition likely to thwart or obstruct discrimination.[19] Respondent offers no explanation, moreover, as to why the actions of petitioner would not satisfy this proposed limitation. Respondent does not deny that Crawford's statements objected to sexual harassment by Hughes, and does not argue that such objections would not constitute resistance. Clearly if the investigators had credited the account of harassment provided by Crawford and others, and that had led to the dismissal of Hughes, their resistance would have been entirely successful. Opposition activities do not lose their protected status under

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[19] Although the distinction would not matter in the instant case, "resistance" would be an unduly narrow definition of opposition. Even where the discrimination in question has ended permanently, and there is no danger of ongoing or future discriminatory acts, an employee might seek some form of redress (e.g. back pay or compensatory time) or simply criticize management for having permitted the past acts of discrimination; such conduct would fairly be regarded as opposition within the scope of section 704(a).

section 704(a) merely because they fail to prevent future harassment.

In the alternative, respondent asserts that to be protected by section 704(a) an employee must not only resist discrimination but also go further and "communicate resistance." (R.Br. 13, 28). But an employee might oppose (or resist) discrimination in a manner that did not communicate anything. For example, if a supervisor were instructed to harass minority employees, but quietly decided to disregard that order, that would constitute opposition, even though neither the official who gave the order nor the intended victims realized what had happened. Again, moreover, respondent does not explain why the facts of this case would not satisfy even this proposed limitation on the opposition clause. The statements made by Crawford to the investigators manifestly did communicate to them that she objected to Hughes' asserted conduct. The investigators themselves expressly characterized Crawford as a "complainant." (Br. Opp., App. 9).

Taking another approach, respondent objects that

> it takes more than merely being in a re-active mode to put an employer on notice that an employee "opposes" an unlawful employment practice.

(R.Br. 3). Respondent appears to contend that an employer could never realize a worker opposed anything if the employee's statements were only made in response to an inquiry from the employer. Evidence that an employee had not initiated the meeting or

conversation in question might be relevant to a dispute as to what that employee said or how those statements would have been interpreted, but it would not be determinative. Thus the fact that Crawford was "in a re-active mode", answering questions rather than filing a complaint on her own initiative, is not conclusive of what Crawford said or meant or of how the investigators construed her statements.

Finally, respondent contends that objecting to discrimination in the course of an employer-initiated investigation is not "oppos[ition]" because such an objection could not constitute "reasonable care" to end that discrimination. (R.Br. 13, 28). But the protections of the opposition clause are not limited to the forms of opposition most likely, or likely at all, to end the discrimination in question. Respondent acknowledges that "expressing support for co-workers who have filed formal charges" would constitute opposition (R.Br. 30); such an expression might bolster the morale of those co-workers, but it would have little if any effect on the likelihood that the asserted discrimination would be prevented. In *Burlington Northern & Santa Fe Rwy. Co. v. White*, 548 U.S. 53 (2006), this Court refused to import into the anti-retaliation provision of Title VII the employer-liability rules regarding sexual harassment articulated in *Ellerth* and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). If an employee who were being groped by her supervisor, reasonable care under *Faragher* and *Ellerth* might require reporting that misconduct to another official; but the employee would assuredly be "oppos[ing]" harassment if she told the abuser to stop, or pushed his hands away.

As the circumstances of this case illustrate, moreover, a statement to company personnel officials describing and objecting to sexual harassment is usually entirely sufficient to constitute reasonable care to prevent that harassment, regardless of the context in which those statements were made. The investigators in the instant case understood precisely what Crawford was asserting and realized full well that she objected to the alleged harassment. Nothing further would have been accomplished if, as respondent and the court below insisted was legally required, Crawford had the next day gone to the office of the same investigators and repeated (now at her initiative) the very allegations which she had already made.

Even if Crawford had filed some sort of formal written complaint with the Director of Schools, respondent argues, that still would have been insufficient.

> It is difficult to treat Ms. Crawford's statements as "opposition" conduct because the concept of "opposition" inherently includes the notion that the employee's "opposition" is communicated to the individuals who allegedly retaliated against the employee.

(R.Br. 31). Respondent reasons that Crawford's statements could not constitute opposition unless they were known to Dr. Garcia and Chris Henson, the officials who allegedly made the decision to dismiss Crawford. (R.Br. 32).

This argument conflates the two distinct elements of an opposition clause claim. First, the plaintiff must establish that he or she engaged in protected "oppos[ition]", e.g. by objecting to action which (if it had occurred or were to occur) would be unlawful (or could reasonably be believed to be unlawful) under Title VII. Second, the plaintiff must show that the defendant took an adverse action "because" the plaintiff had engaged in that protected activity. 42 U.S.C. §2000e-3(a). A factual determination as to whether the relevant decisionmakers knew of the protected activity would be relevant to the second issue, but not to the first. A decisionmaker could not act "because of" protected activity of which he or she was unaware.[20] Whether a decisionmaker knew of (and then took action "because" of) the plaintiff's actions is a distinct issue from whether those actions themselves constituted protected activity under section 704(a).

Respondent notes that the EEOC Compliance Manual lists four "examples of opposition."[21] "None of

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[20] Where the ultimate decisionmaker relied, for example, on the advice of or information provided by a second official, an unlawful motive on the part of either could render the disputed decision unlawful. The lower courts have taken different approaches in dealing with decisions involving two or more such officials. This Court granted certiorari to resolve that question in *BCI Coca-Cola Bottling Co. of Los Angeles v. EEOC*, 127 S.Ct. 1931 (2007)(dismissing writ of certiorari pursuant to S.Ct. Rule 46.2).

[21] The four examples are "[t]hreatening to file a charge or other formal complaint alleging discrimination," "[c]omplaining to anyone about alleged discrimination against oneself or others,"

them describes Ms. Crawford's act of answering questions during an interview." (R.Br. 38). Respondent contends that the Compliance Manual is therefore "inconsistent" with the interpretation of section 704(a) that the EEOC has advocated in this Court and the lower courts. (R.Br. 38-39). But the four "examples of opposition" in the Compliance Manual are just that, examples; nothing in the Manual suggests that the Commission believes that these are the only forms of protected activity. Respondent argues that each of the examples "require[s] initiative by the employee." (R.Br. 38). Even if each of the four examples happened to have that common element, the Manual could not plausibly be read as "requir[ing]" that same element be proven in all cases under the opposition clause. The Manual states that "[a] *complaint* about an employment practice constitutes protected activity" (emphasis added); but the Manual does not suggest that it matters whether the employer or the employee called the meeting at which the complaint was made. In the instant case, Crawford's statements about Hughes' harassment certainly constituted a complaint: she described to respondent's personnel officials conduct by Hughes to which she emphatically objected. "Complainant" is the very term which respondent's own investigators used to describe Crawford herself. (Br. Opp., App. 9).

"[r]efusing to obey an order because of a reasonable belief that it is discriminatory" and "[r]equesting reasonable accommodation or religions accommodation." Compliance Manual, section 8-II(B)(2).

III. RESPONDENT'S FACT-BASED DEFENSES CAN BE LITIGATED ON REMAND

In the proceedings below, respondent raised but the lower courts did not resolve a number of alternative factual contentions which it urged would warrant summary judgment. Although respondent to some degree renews those arguments here (R.Br. 8 n. 12, 41), they were not passed on by the district court or court of appeals, were not the subject of a cross petition, and thus are not properly before this Court.[22] Respondent is free to renew those objections on remand.

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[22] Respondent contends, for example, that Chris Henson and Dr. Garcia, officials involved in the dismissal of Crawford, did not know that Crawford was among those who had complained about sexual harassment. Yet Dr. Garcia testified he was told by Hughes that the investigation "had to do with Vicky Crawford". (J.A. p. 60-61). Likewise, Henson had been told that Crawford "testified against Hughes in terms of sexual harassment" before making the dismissal decision. (Record, 58, Response to Motion for Summary Judgment, Ex. 10, December 12, 2002 hearing p. 6-7). And rather than maintaining confidentiality, Frazier testified she makes sure that the alleged harassers and supervisors know the identity of the complaining party so that there can be no retaliation. (J.A. p. 38-40).

Respondent insists that Crawford was guilty of financial mismanagement. In opposition to respondent's motion for summary judgment, however, Crawford offered voluminous evidence to the contrary. (Record, 61, Plaintiff's Response to the Defendant's Statement of Material Facts, No. 14).

CONCLUSION

For the above reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

VICKY S. CRAWFORD,

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v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENT

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Comes the Metropolitan Government of Nashville and Davidson County ("Respondent"), and responds to the Brief of *Amicus Curiae* of the United States of America ("United States"):

STATEMENT OF THE CASE

In an unpublished opinion, the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit") affirmed the decision of the United States District Court for the Middle District of Tennessee ("District Court"), holding that Petitioner Vicky Crawford ("Petitioner") had not engaged in protected activity pursuant to Title VII of the Civil Rights Act of 1964, ("Title VII"), by giving a statement during an internal sexual harassment investigation initiated by her employer. (Petition for Writ of Certiorari ["Pet."] at 3a-10a). Specifically, the Sixth Circuit held that Petitioner's conduct was not covered by Title VII's anti-retaliation provision, Section 704(a), 42 U.S.C. § 2000e-3(a)("Section 704(a)").

Petitioner has requested that this Court review this decision, and the United States has filed an *Amicus Curiae* brief in support of Petitioner's request. For the reasons set forth herein, Respondent submits that the Petition for Writ of Certiorari should be denied.

ARGUMENT

I. THE ISSUES RAISED IN THIS CASE HAVE BEEN DECIDED CONSISTENTLY BY ALL CIRCUIT COURTS ADDRESSING THEM.

This Court has unequivocally stated that "[a] petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. Moreover, this Court has identified the primary example of such a compelling situation: "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter. . . ." Sup. Ct. R. 10(a). Here, it is undisputed that there is no circuit split.

The United States repeatedly admits that there is "no square conflict" among the circuits "on either the opposition or participation clause issue" decided in Respondent's favor by the Sixth Circuit.[1] (Brief for the United States as *Amicus Curiae* ["*Amicus* Br."] at 15). The United States also undermines Petitioner's reliance on a litany of cases because those decisions did not focus on the issues decided by the Sixth Circuit and therefore cannot be deemed to create a circuit split. (*Amicus* Br.

1. Despite this admission, the United States asserts earlier in its brief that "[n]o appellate decision" has limited the phrase 'investigation'" under Title VII to EEOC investigations. (*Amicus* Br. at 11). This statement is inaccurate and is contradicted by established law as well as the United States' own statement on pages 17-18 of its brief that "the Sixth Circuit's view is in line with the decisions of other circuits" that have found that Title VII's participation clause is triggered only after the filing of an EEOC charge. (*Amicus* Br. at 17-18) (citations omitted).

at 16-17). Finally, the United States concedes that the circuits agree that "the participation clause requires the filing of an EEOC charge. . . ." (*Amicus* Br. at 17-18). Because all of the circuits addressing the issues raised in this case have reached the same conclusion as did the Sixth Circuit here, there is no compelling reason for this Court to grant certiorari.

Despite its recurring statements establishing that no circuit split exists, the United States asserts nonetheless that the Sixth Circuit's decision is an "outlier" when compared to other circuits. (*Amicus* Br. at 15). However, the only case cited by the United States other than those that the United States points out were cited by Petitioner but are not actually in conflict with well-settled precedent, is *EEOC v. Total Systems Services, Inc.*, 221 F.3d 1171 (11th Cir. 2000). *Total Systems* does not support the United States' "circuit split" argument, however.[2] Instead, the Eleventh Circuit simply stated that even if the plaintiff's statements "might otherwise have constituted protected expression under the opposition clause," the district court correctly granted summary judgment to the defendant employer because the employer has shown a legitimate reason for terminating the plaintiff. *Id.* at 1175. This single sentence certainly does not indicate that the Eleventh Circuit has adopted the position that statements made by an employee during an internal investigation of a co-worker's sexual harassment claim, even if those statements corroborate the complainant's account of events, are protected activity under Section 704(a).

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2. In fact, *Total Systems* was one of several cases cited by the Sixth Circuit in support of its decision to affirm the District Court's grant of summary judgment. (Pet. at 8a).

The holding of the *Total Systems* court was that, contrary to the EEOC's position, Title VII did not provide protection for all statements made during an employer's internal investigation. An employee whom the employer believed had lied during the investigation could not invoke the protection of Section 704(a).[3] *Id.* at 1176. The *Total Systems* decision is consistent with Respondent's position and the holding of the Sixth Circuit here: giving statements during an employer's internal investigation, in and of itself, does not afford employees blanket protection under Section 704(a). Thus, the United States' cannot rely on *Total Systems* to create a fictional "circuit split."

II. NO IMPORTANT QUESTIONS OF FEDERAL LAW WILL BE RESOLVED BY GRANTING CERTIORARI.

Another factor to be considered in determining whether to grant a petition for writ of certiorari is whether a court of appeals decision has addressed, "an important question of federal law that has not been, but should be settled by this Court . . ." Sup. Ct. R. 10(c). The present case involves no such "important question

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3. In the present case, Respondent's legitimate reasons for terminating Petitioner were never fully explored by the lower courts. The District Court determined that Petitioner had not engaged in protected activity under Title VII; thus, it declined to address the other grounds raised by Respondent in its motion for summary judgment, including that (1) Petitioner could not show that the decision-makers regarding her termination were aware of the statements that she made during the internal investigation; and (2) Respondent had a non-discriminatory, non-pretextual reason for terminating Petitioner. (Pet. at 13a-14a, 17a).

of federal law." Instead, the United Stated requests that this Court review an unpublished opinion of limited precedential value and re-write provisions of Title VII to serve the interests of an individual who was discharged for gross neglect of her job duties.[4]

A. *An unpublished, non-binding court of appeals decision does not merit examination by this Court.*

The United States' position that this is a case of great importance is undermined by the fact that the Sixth Circuit's opinion is unpublished, which the United States concedes "would normally counsel *heavily* against plenary review." (*Amicus* Br. at 22 [emphasis added]). Sixth Circuit Rule 206(a) provides, in pertinent part, that a panel should consider the following criteria in determining whether a decision should be published:

> (1) whether it establishes a new rule of law, or alters or modifies an exiting rule of law, or applies an established rule to a novel fact situation;
>
> (2) whether it creates or resolves a conflict or authority either within the circuit or between this circuit and another;

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4. Most significantly, Petitioner failed to (1) deposit employee pension contributions; (2) properly remit employee annuity contributions; and (3) timely file federal tax returns, which resulted in significant penalties to Respondent. (Respondent's Brief in Opposition to Petitioner's Petition for Writ of Certiorari ["Resp't's Br."] at App. 20-23, 31-34).

> (3) whether it discusses a legal or factual issue of continuing public interest; . . .

6th Cir. R. 206(a). Not one member of the panel that affirmed the District Court's grant of summary judgment here concluded that its opinion met these criteria. *See* 6th Cir. R. 206(b) ("An opinion or order shall be designated for publication upon the request of any member of the panel").

Additionally, an unpublished opinion does not constitute binding precedent. *United States v. Sanford*, 476 F.3d 391, 396 (6th Cir. 2007); *United States v. Ennenga*, 263 F.3d 499, 504 (6th Cir. 2001). It defies logic that an unpublished opinion, given its limited precedential value, represents a monumental decision in the landscape of Title VII litigation.

B. *This Court's review of the facts surrounding Petitioner's justified termination is not needed to answer important questions of federal law.*

Further, the circumstances of Petitioner's termination make this an unsuitable case from which to shape retaliatory discharge law. Contrary to the United States' position,[5] there are no important questions of

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5. In its brief, the United States adopted the "facts" as set forth by the Sixth Circuit, which took the facts in the light most favorable to Petitioner. (Pet. at App. 4a-6a). However, this Court recently noted in *Scott v. Harris* that, when a party's version of the facts is blatantly contradicted by the record, courts instead should view the facts in the light depicted by the record *Scott v. Harris*, 127 S. Ct. 1769, 1776 (2007). The record here establishes that Petitioner was terminated for blatant failure to do her job. (Cont'd)

federal law at the heart of this case. The internal investigation here was initiated proactively by Respondent's Department of Law. As part of this investigation, on July 22, 2002, Veronica Frazier ("Ms. Frazier"), Respondent's Assistant Director of Human Resources, requested an interview with Petitioner regarding alleged inappropriate behavior by Petitioner's co-worker, Dr. Gene Hughes ("Dr. Hughes").[6] Petitioner had no idea why Ms. Frazier had requested to speak to her prior to their discussion. (Resp't's Br. at App. 4-6). Petitioner never lodged a complaint about the alleged harasser and took no action to initiate the investigation in question.[7] *Id.*

In January 2003, months after being interviewed by Ms. Frazier, Petitioner was terminated for reasons wholly unrelated to the statements she made during the internal investigation. (Resp't's Br. at App. 29-41). Petitioner was the payroll coordinator for Respondent's public schools. Independent auditors raised concerns

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(Cont'd)

(Resp't's Br. at App. 20-41). The United States chooses to ignore that portion of the record, which also establishes Petitioner's failure to offer evidence refuting the charges leading to her termination, and instead offers only that, "according to [P]etitioner," the accusations made against her "were unfounded." (*Amicus* Br. at 2).

6. Dr. Hughes was not Petitioner's supervisor. (Resp't's Br. at 10, n.4).

7. Furthermore, Petitioner did not even file a charge with the EEOC until June 24, 2003, more than five months after her termination. (Resp't's Br. at App. 42-43).

regarding "operational irregularities" in the payroll department during the annual audit performed in the fall of 2002. A forensic accountant subsequently was engaged to commence a more extensive audit of that department. (Resp't's Br. at App. 30). After a detailed investigation, Petitioner ultimately was terminated due to her well-documented failure to perform her job duties. (Resp't's Br. at App. 25-27). Petitioner was given ample opportunity, at two administrative hearings, to rebut the evidence against her; however, she offered little defense. Additionally, numerous witnesses offered testimony against her during the administrative appeal process. (Resp't's Br. at App. 25-41).

Moreover, the individual who made the decision to terminate Petitioner, Respondent's Superintendent of Business and Facility Services, Chris Henson, was not involved in the internal investigation of Dr. Hughes. (Resp't's Br. at App. 8-17). This discredits Petitioner's contention that she was terminated because of statements made during the internal investigation, especially since investigators were careful in their final investigative report not to attribute specific statements regarding Dr. Hughes' conduct to specific employees. (Resp't's Br. at App. 9).

Simply put, this is not a case involving significant issues of federal law or facts that this Court is likely to encounter again in the future.[8] Petitioner was fired for

8. The United States' position that this a matter of great importance is further undermined by the fact that the EEOC declined to file suit in this case, despite its right to do so. In fact, the EEOC determined that it could not conclude that Petitioner's Title VII rights had been violated at all. (Resp't's Br. at App. 45).

failure to perform her job duties months after having given a statement that corroborated accounts of a co-worker's inappropriate behavior during an internal investigation of such behavior. Petitioner's insistence that other employees who gave statements during the investigation were also terminated in retaliation for their statements is unfounded.[9] Because this case is not one that could adequately shape retaliatory discharge law, given the lack of any retaliation against Petitioner, this Court should decline to grant certiorari.

III. THIS CASE DOES NOT PRESENT SIGNIFICANT PUBLIC POLICY CONCERNS IN NEED OF RESOLUTION BY THIS COURT

A. *If Title VII's language is to be broadened to protect any employee who gives a statement during an internal investigation from ever being terminated, it is Congress' place to do so.*

Legislating public policy comes within the purview of Congress. U.S. CONST art. I, § 8, cl. 18. Here, both Petitioner and the United States appear dissatisfied that Congress did not provide a list enumerating the activities that rise to the level of "opposition" or "participation"

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9. As Respondent has previously noted to the Court, the other two employees whom Petitioner alleges were terminated as a result of the statements that they made during the internal investigation at issue were not victims of retaliatory discharge. (Response to Brief of *Amici Curiae* of the Tennessee Education Association and The Metropolitan Nashville Education Association at 6-7).

for purposes of invoking Section 704(a) protections.[10] However, such dissatisfaction should be voiced to Congress. In drafting Title VII, Congress purposely allowed employers to retain discretion in dealing with their employees in order to balance the interests of employers and employees. *See Laughlin v. Metro. Wash. Airports Auth.*, 149 F.3d 253, 259 (4th Cir. 1998) (citations omitted). If this autonomy and balance is to be abrogated by significantly broadening the scope of Section 704(a), it is Congress' place to amend Section 704(a) to achieve that purpose. *See, e.g., Ledbetter v. Goodyear Tire and Rubber, Co., Inc.*, 127 S. Ct. 2162, 2177 (2007)("it is not our prerogative to change the way in which Title VII balances the interests of aggrieved employees.... We apply the statute as written . . .") (citation omitted).

B. *Adopting the interpretation of Section 704(a) advocated by the United States would deter employers from conducting the internal investigations encouraged by this Court.*

In support of its assertion that Petitioner's case should be reviewed because not providing Title VII protections to all employees giving statements during

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10. The circuit courts agree that the participation clause requires the filing of an EEOC charge before Section 704(a)'s protections will apply. Congress drafted Section 704(a) to refer to two separate forms of "protected activity: "opposition" and "participation." The United States' position that no affirmative action is necessary to invoke protection under the opposition clause, although it is required under the participation clause, renders the participation clause devoid of meaning. Under the United States' interpretation of the statute, the opposition clause would entirely supplant the participation clause.

an internal harassment investigation would have a chilling effect on employees' willingness to participate in such investigations, the United States attempts to rely on this Court's precedent. (*Amicus* Br. at 5, 11-14). However, the United States' reliance on the *Farragher v. City of Boca Raton*, 524 U.S. 775 (1998), *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526 (1999) decisions is misplaced. These cases do not, as the United States suggests, impose an "affirmative duty" upon employers to conduct internal harassment investigations, but instead give employers an affirmative defense to liability or damages under certain circumstance when the employer exercises reasonable care to prevent and correct sexual harassment in the workplace. *Farragher*, 524 U.S. at 777-778.

As stated in *Ellerth*, "[l]imiting employer liability is . . . consistent with Title VII's purpose to . . . encourage the creation and use of antiharassment policies and grievance procedures." *Ellerth*, 524 U.S. at 745. Still, if the employer proceeds unreasonably or in bad faith, the employer loses this protection. *Kolstad*, 527 U.S. at 545-546. The Sixth Circuit astutely noted, in response to the assertion that employees would be unwilling to give statements during internal investigations if they were not given blanket protection under Section 704(a), that "[c]ertainly, a policy or practice of firing a person who testified negatively during an investigation into complaints of sexual harassment would not be 'reasonable'" and "would certainly constitute bad faith." (Pet. at 9a). In that situation, the protections afforded by the affirmative defense to liability available to an employer under *Farragher*, *Ellerth*, and *Kolstad* would

disappear. Thus, this Court's well-established precedent defeats Petitioner's contention that an employer can hide behind a vicarious liability shield while simultaneously wielding a retaliation termination sword against witness employees unless the scope of Section 704(a) is broadened.

The reality is that adopting the United States' position here would have a chilling effect not upon employees' willingness to participate in internal investigations, but upon employers' willingness to conduct them. If "protected activity" under Title VII is broadened to include an employee's giving of a statement, upon request, to an employer who has initiated an internal investigation of a harassment complaint, employers would lose the incentive created by *Farragher*, *Ellerth*, and *Kolstad* to conduct such investigations. Under the United States' proposed interpretation of Section 704(a), employers would be unable to terminate an employee who gave a statement during an internal investigation, no matter when or for what reason that termination occurred, without fear of a retaliation lawsuit. Such a result would discourage the very type of investigations that this Court promoted through its earlier decisions and would undermine the purposes of Title VII. *See Kolstad*, 527 U.S. at 545 ("[d]issuading employers from implementing programs or policies to prevent discrimination in the workplace is directly contrary to the purposes underlying Title VII."). Accordingly, there is no compelling reason for this Court to review the Sixth Circuit's decision here, which gives effect to the language of Section 704(a) and is consistent with the policies underlying Title VII.

CONCLUSION

Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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No. 06-1595

In the Supreme Court of the United States

VICKY S. CRAWFORD, PETITIONER

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether, or to what extent, Title VII's anti-retaliation provision, Section 704(a) of the 1964 Civil Rights Act, 42 U.S.C. 2000e-3(a), protects an employee from being dismissed because she cooperated with her employer's internal investigation of sexual harassment.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents the question whether, and to what extent, Title VII's anti-retaliation provision, Section 704(a) of the 1964 Civil Rights Act, 42 U.S.C. 2000e-3(a), protects an employee from being dismissed because she cooperated with her employer's internal investigation of sexual harassment. The United States has a significant interest in the resolution of that question. The Attorney General enforces Title VII against public employers, and the Equal Employment Opportunity Commission (EEOC) enforces Title VII against private employers. In addition, Title VII applies to the federal government as an employer. See 42 U.S.C. 2000e-16 (2000 & Supp. V 2005). The United States, as the principal enforcer of

the civil rights laws and the Nation's largest employer, has a strong interest in the proper enforcement of Title VII. At the Court's invitation, the United States filed a brief at the petition stage of this case.

STATEMENT

1. Petitioner worked as a payroll coordinator for respondent Metropolitan Government of Nashville and Davidson County, Tennessee, for over 30 years. In the fall of 2001, respondent hired Dr. Gene Hughes as the Metro School District's employee relations director. Pet. App. 4a, 13a. In 2002, respondent, in accordance with its formal anti-harassment policy, initiated an internal investigation into Hughes's conduct after a lawyer in respondent's Legal Department learned that several employees had "expressed concern about specific incidents of inappropriate behavior by Hughes." *Id.* at 4a.

The assistant director of human resources, Veronica Frazier, was assigned to investigate the allegations. Pet. App. 4a-5a. As part of respondent's investigation, Frazier interviewed several employees who worked with Hughes, including petitioner. *Id.* at 5a, 13a. Petitioner informed Frazier that Hughes had sexually harassed her and other employees. Specifically, petitioner reported that Hughes "had asked to see her titties on numerous occasions"; grabbed his genitals; "put his crotch up to [her] window"; and, once "came into her office" and, after petitioner "asked him about what she could do for him," Hughes "grabbed her head and pulled it to his crotch." *Id.* at 5a n.1.

The investigation did not result in any disciplinary action against Hughes. Respondent, however, subsequently fired petitioner and two other employees who

alleged during the investigation that Hughes engaged in sexually harassing behavior. Pet. App. 5a. Respondent claims it fired petitioner after accusing her of embezzlement and drug use but, according to petitioner, those accusations were unfounded. *Id.* at 5a-6a.

2. After filing a charge with the EEOC, petitioner filed the instant suit, alleging that respondent violated Title VII by firing her because she disclosed Hughes's sexually harassing behavior during the internal investigation. Pet. App. 13a. The district court granted summary judgment in favor of respondent on the ground that petitioner's participation in the internal investigation of Hughes was not conduct covered by Title VII's anti-retaliation provision, Section 704(a), 42 U.S.C. 2000e-3(a). That provision makes it "an unlawful employment practice for an employer to discriminate against any of his employees * * * [1] because [the employee] has opposed any practice made an unlawful employment practice by this subchapter, or [2] because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." *Ibid.* The first of the numbered clauses is known as the "opposition clause" and the second as the "participation clause."

The district court concluded that respondent's alleged retaliation did not fall within the ambit of either clause. Relying on Sixth Circuit precedent, the district court concluded that petitioner's participation in her employer's investigation did not fall within Title VII's participation clause because respondent's investigation was not conducted pursuant to a pending EEOC charge. Pet. App. 15a. The district court explained that "Title VII protects an employee's participation in an employer's internal investigation into allegations of unlaw-

ful discrimination *where that investigation occurs pursuant to a pending EEOC charge.*" *Ibid.* (quoting *Abbott* v. *Crown Motor Co.*, 348 F.3d 537, 543 (6th Cir. 2003)). The district court further held that petitioner's involvement in the internal investigation did not constitute opposition to an unlawful employment practice, because she "merely answered questions by investigators in an already-pending internal investigation, initiated by someone else." *Id.* at 16a. The court also explained that although petitioner alleges that she "fully cooperated with Metro's investigation" and "testified unfavorably" against Hughes in response to the investigators' questions, there was no allegation that she "instigated or initiated any complaint." *Id.* at 16a-17a. The district court thus concluded that petitioner's activity was not opposition within the meaning of Section 704(a). *Ibid.*

3. The court of appeals affirmed. Pet. App. 3a-10a. The Sixth Circuit first concluded that petitioner's actions were not protected under Section 704(a)'s opposition clause. In so holding, the court stated that "[t]he general idea is that Title VII 'demands active, consistent "[o]pposing" activities to warrant . . . protection against retaliation.'" *Id.* at 7a (quoting *Bell* v. *Safety Grooving & Grinding, LP*, 107 Fed. Appx. 607, 610 (6th Cir. 2004), and citing *Johnson* v. *University of Cincinnati*, 215 F.3d 561, 579 (6th Cir.), cert. denied, 531 U.S. 1052 (2000)). The court further reasoned that petitioner's actions in "relating unfavorable information about Hughes" during the investigation did not qualify as "overt opposition" protected under the statute, because petitioner "does not claim to have instigated or initiated any complaint prior to her participation in the investigation, nor did she take any further action

following the investigation and prior to her firing." *Id.* at 7a-8a.

The court of appeals next concluded that petitioner's actions were not protected under Section 704(a)'s participation clause. Pet. App. 8a. The court reasoned that Title VII protects an employee's participation in an employer's internal investigation into allegations of unlawful discrimination only when that investigation occurs pursuant to a pending EEOC charge. *Ibid.* In this case, the court explained, "no EEOC charge had been filed at the time of the investigation or prior to her firing." *Ibid.*

4. The court of appeals denied rehearing. Pet. App. 1a-2a.

SUMMARY OF ARGUMENT

Title VII prohibits an employer from retaliating against an employee who discloses unlawful activity during her employer's internal investigation. Such retaliation comes within the ambit of both clauses of Title VII's anti-retaliation prohibition, and there is no reason that Congress would have countenanced the inexplicable gap in Title VII's enforcement scheme created by the court of appeals.

A. Section 704(a)'s opposition clause is written in broad terms that gives effect to its critical enforcement objectives. When an employer asks an employee, as part of an internal investigation designed to root out alleged unlawful employment practices, to disclose instances of inappropriate conduct by a supervisor, and when the employee in turn discloses unwelcomed and unlawful employment practices, that employee has "opposed" conduct made unlawful by Title VII. The employee is thus protected from retaliation under Title

VII's opposition clause. Nothing in that clause restricts protection to only those employees who either initiated the discussion with their employer or who took further action beyond complaining to their employer during the investigation, and reading that limitation into the clause would be at odds with the purpose of the statute and its enforcement scheme.

B. Section 704(a)'s participation clause also protects an employee's participation in an employer-initiated investigation into unlawful employment practices. Congress's expansive use of "investigation, proceeding, or hearing" reflects that Congress intended to cover the gamut of situations in which an employee might be asked to participate. An employer-initiated investigation designed to detect discrimination prohibited by Title VII is reasonably construed to be an investigation "under" Title VII. 42 U.S.C. 2000e-3(a). Employers must conduct such investigations to avoid liability under this Court's decisions in *Faragher* v. *City of Boca Raton*, 524 U.S. 775 (1998), *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998), and *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526 (1999). Such investigations are an integral part of Title VII's framework and accordingly are fairly viewed as being subject to and governed by Title VII.

Conditioning protection under the participation clause on the filing of an EEOC charge would lead to the perverse result of requiring employers to conduct internal investigations to identify potentially unlawful employment practices so that the employer may avoid liability under Title VII, but denying the full protections of Title VII to the witnesses who participate in those investigations. Such a result is inconsistent with Title VII's central objective to prevent and deter harm. At a

minimum, the court of appeals erred in concluding that Congress intended to leave petitioner unprotected by *both* clauses. A complaining witness needs protection against retaliation for providing candid information to the employer during an internal investigation regardless of whether a charge has been filed at the time of the employee's participation in the investigation.

C. Congress did not intend to leave an unjustified and inexplicable gap in Section 704(a)'s coverage by failing to provide protection against retaliation to employees who disclose unlawful conduct during an employer-initiated investigation. Internal investigations are an integral aspect of Title VII, and there is no reason to leave complaining witnesses unprotected. Title VII's enforcement depends on participation and truthful cooperation by employees during employer-sponsored investigations. If employees are afraid to report instances of harassment or to participate in employer investigations out of fear of retaliation, employers may not become fully aware of harassment, thereby preventing them from taking corrective action.

Moreover, by virtue of this Court's decisions, recovery by employees and liability for employers can turn on the existence of the adoption of internal complaint policies and the extent to which the employee avails herself of such procedures. Those internal procedures can give effect to Title VII's enforcement scheme, as intended by this Court's decisions, only if employees who give candid testimony are protected against retaliation.

D. The EEOC's reasonable interpretation of Section 704(a)'s protective reach is entitled to a measure of deference. EEOC's interpretation is embodied in its Compliance Manual and has been embraced in litigation. The agency's interpretation not only squares with the

text of the statute for the reasons summarized above, but reflects the EEOC's considered and expert judgment that anti-retaliation protection for employees in petitioner's position is critical to the effective enforcement of Title VII. To the extent that the Court has doubt about the reach of the language used by Congress, it should give effect to the longstanding interpretation of the EEOC that Section 704(a) extends to the circumstances presented by this case.

ARGUMENT

TITLE VII PROHIBITS RETALIATION AGAINST AN EMPLOYEE ON THE BASIS OF HER COOPERATION WITH AN EMPLOYER'S INTERNAL INVESTIGATION INTO SUSPECTED UNLAWFUL EMPLOYMENT ACTIVITIES

Title VII expressly prohibits employers from retaliating against employees who report or complain about unlawful discrimination in the workplace. The opposition clause of Title VII's anti-retaliation provision protects an employee who has "opposed" an employment practice made unlawful by Title VII, and the participation clause of that provision protects an employee who has "participated in any manner in an investigation * * * under [Title VII]." 42 U.S.C. 2000e-3(a). Both of those clauses protect an employee's disclosure of discriminatory acts during an employer's internal investigation into suspected sexual harassment in the workplace. The court of appeals' contrary conclusion that *neither* clause of Section 704(a) protects petitioner creates an inexplicable enforcement gap in Title VII's protection against retaliation that conflicts with the text and purposes of Section 704(a) and the considered views of the EEOC. In part because of this Court's own decisions interpreting Title VII, internal investigations are

increasingly an integral aspect of Title VII and there is no reason to hold that complaining and cooperating witnesses in such circumstances are left unprotected by Title VII's anti-retaliation provision.

A. The Opposition Clause Protects An Employee Who Complains Of Unlawful Employment Activities During Her Employer's Internal Investigation

Section 704(a)'s opposition clause is written in broad terms that give effect to its important remedial objectives. It protects an employee from retaliation because she has "opposed any practice made an unlawful employment practice" by Title VII. 42 U.S.C. 2000e-3(a). Properly construed, that clause protects an employee who, during an employer-initiated internal investigation into suspected unlawful employment practices, communicates to her employer a reasonable belief that she was the victim of an unlawful employment practice.

1. The plain meaning of the word "oppose" is "to be hostile or adverse to, as in opinion." *Random House Dictionary of the English Language* 1359 (2d ed. 1987); *American Heritage Dictionary* 872 (1982) ("[t]o be in contention or conflict with" or "[t]o be resistant to"). When an employee communicates to her employer a belief that the employer has engaged in activity that constitutes a form of employment discrimination, that communication constitutes the employee's *opposition* to the activity. See 2 EEOC Compl. Man. (BNA) § 8-II(B)(1), at 614:0003 (Mar. 2003) (opposition clause "applies if an individual explicitly or implicitly communicates to his or her employer or other covered entity a belief that its activity constitutes a form of employment discrimination"); *id.* § 8-II(B)(2), at 614:0003 (protected opposition occurs when a "complaint would reasonably

[be] interpreted as opposition to employment discrimination"). Cooperation with an employer's internal investigation is by no means incompatible with opposition to the subject of that investigation. An employee's disclosure of *unlawful* activity in response to the employer's investigation to root out unlawful activity is reasonably—and naturally—viewed as opposition to that activity. Title VII was undoubtedly written against the common sense understanding that no reasonable employee welcomes discrimination in the workplace, especially when it is directed at the employee herself, and that declarations that a supervisor engaged in, for example, sexual harassment, constitutes opposition to that activity (much the same way statements covering it up would be viewed as supporting the activity).

This case well illustrates the point. Respondent initiated an investigation after several employees expressed concern about sexual harassment by Hughes. Pet. App. 4a. Petitioner was interviewed as part of that investigation, and was asked in the investigation to report "any *inappropriate* behavior by Mr. Hughes." C.A. App. 46 (Dep. of Vicki Crawford) (emphasis added); accord *id.* at 47. Petitioner then made unmistakably clear that Hughes's conduct was unwelcomed as she reported that she had "*felt very uncomfortable* around Mr. Hughes" because he "would grab himself" whenever she w[illegible]'d speak to him. *Id.* at 44 (emphasis added). Petitioner also reported that Hughes would respond to her question of "what's up?" by grabbing his crotch and saying "you know what's up," *id.* at 45; that he would knock on the window to her office and would press his crotch to the window, *ibid.*; that at times, "he would come to [her] window * * * and would say, "Let me see your titties," *ibid.*; and that he once walked into her office,

and when she asked how could she help him, "he grabbed her head and pulled it to his crotch." Pet. App. 5a n.1. Particularly given respondent's request to disclose Hughes's inappropriate behavior, petitioner's specific responses establish her reasonable belief that the conduct she described was unwelcomed and unlawful.

Moreover, petitioner's disclosure during the interview of such reprehensible conduct unmistakably communicated her opposition to Hughes's conduct. After recounting such graphic and obviously inappropriate acts against her in response to a request to report inappropriate behavior, petitioner was not required to make explicit that she opposed such conduct before coming within Section 704(a)'s protection. The nature of the conduct described and the setting of the internal investigation sufficed to register petitioner's opposition to the conduct. Certainly, Hughes could have reasonably perceived it as such. Indeed, the record reflects that petitioner reasonably believed that by reporting Hughes's misconduct during a formal investigation, she had "testified *against*" Hughes. C.A. App. 47; accord Pet. App. 5a ("According to petitioner, she believed that she was exercising her rights under federal law when she informed Frazier of Hughes's actions."). And in any event, the Congress that passed Title VII would have assumed that employees who reported such misconduct *opposed* such misconduct. Petitioner's recital during the course of her employer's investigation of specific instances of conduct by Hughes that she reasonably believed to be unlawful was therefore protected activity under the opposition clause.

2. The court of appeals believed that the opposition clause "demands active, consistent '[o]pposing' activities to warrant * * * protection against retaliation." Pet.

App. 7a (quoting *Bell, LP*, 107 Fed. Appx. at 610). But Section 704(a) protects employees who "oppose[]" unlawful practices; the terms "active" and "consistent" nowhere appear in the text of the statute. Indeed, no other circuit has adopted such a circumscribed interpretation of Section 704(a)'s opposition clause. The court of appeals likewise engrafted an extra-textual gloss on the statute by holding that petitioner was not covered by the opposition clause because respondent initiated the interview in which petitioner complained of Hughes's harassing conduct. *Ibid.* Whether an employee receives protection under Title VII's anti-retaliation provision does not depend on who initiated the interview in which the employee complained of unlawful conduct. The statutory touchstone is opposition, not initiation.

The court of appeals' initiation requirement ignores the practical reality that many employees do not *initiate* complaints of discrimination precisely because they fear retaliation. *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors*, 2 EEOC Compl. Man. (BNA) Pt. V(C)(1)(b) at 615:0108 n.59 (Oct. 2002) ("Surveys have shown that a common reason for failure to report harassment to management is fear of retaliation * * * [and] a significant proportion of harassment victims are worse off after complaining."); see, *e.g.*, C.A. App. 47 (petitioner's testimony that "I felt afraid that if I testified against him * * * I would lose my job").

Moreover, regardless of why an employee did not initiate a complaint earlier, Title VII protects employees who do so as part of an internal investigation. Although Title VII encourages all employees to report unlawful employment practices, it does not discriminate against those who (for whatever reason) wait to report unlawful

practices in the context of an employer investigation. Accordingly, the relevant inquiry in this context is whether the employer reasonably should have understood that the employee was disclosing an employment practice made unlawful by Title VII. 2 EEOC Compl. Man. (BNA) § 8-II(B)(2) (Mar. 2003); accord *EEOC Interpretive Manual, Reference Manual to Title VII Law for Compliance Personnel* § 493.2 (1972) (individual protected from retaliation if "the circumstances surrounding the complaints were such that [the employer] knew or should have known that [the individual] was complaining about Title VII discrimination."). When that criteria is satisfied, Title VII protects the employee against retaliation for her disclosure.

For the same reasons, Section 704(a) does not require an employee to take "further action" in opposition beyond complaining about unlawful activity to an employer. Pet. App. 7a. Voicing opposition to an employer about suspected unlawful activity constitutes protected opposition, whether or not she has filed a formal or informal complaint. See, *e.g.*, *Kotcher* v. *Rosa & Sullivan Appliance Ctr., Inc.*, 957 F.2d 59, 65 (2d Cir. 1992) (opposition encompasses an individual's complaints to supervisors regardless of whether she also files an EEOC charge); *Pastran* v. *K-Mart Corp.*, 210 F.3d 1201, 1205 (10th Cir. 2000) (same); *Rollins* v. *Florida Dep't of Law Enforcement*, 868 F.2d 397, 400 (11th Cir. 1989) (opposition clause protects "those * * * who informally voice complaints to their supervisors"); *Armstrong* v. *Index Journal Co.*, 647 F.2d 441, 448 (4th Cir. 1981) (same). Here again, the statutory trigger is "opposi[tion]"; the statute does not require an employee to take further action, such as filing a formal complaint, *in addition to* expressing her opposition to discriminatory conduct.

Contrary to respondent's suggestion, requiring an employee to engage in "affirmative action," beyond complaining about unlawful employment action during an employer-initiated interview, is not necessary to prevent the opposition clause from "entirely supplant[ing] the participation clause." Supp. Br. 10 n.10. The participation clause covers any employee who participated "in any manner in an investigation, proceeding, or hearing" under Title VII. 42 U.S.C. 2000e-3(a). The clause therefore protects an employee even if she does not oppose an employment practice, and even if she does not complain about conduct made unlawful under Title VII. 2 EEOC Compl. Man. (BNA) § 8-II(C)(2) (Mar. 2003). Moreover, the notion that both clauses of Section 704(a) are written expansively reflects Congress's intent to ensure broad protection against retaliation, not an effort to identify two mutually exclusive or hermetically sealed sub-species of retaliation.

3. Under the opposition clause, the employee must have at least a *reasonable* belief that the conduct she is opposing is unlawful under Title VII. 2 EEOC Compl. Man. (BNA) § 8-II(B)(3)(b) (Mar. 2003) ("A person is protected against retaliation for opposing perceived discrimination if s/he had a reasonable and good faith belief that the opposed practices were unlawful."). The courts of appeals uniformly have endorsed that view and have held that the protections of Section 704(a) are not limited to those employees who have opposed a practice that is ultimately adjudged to be unlawful, but rather to those employees who oppose a practice they reasonably believe to be unlawful.[1]

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[1] See, *e.g.*, *Parker* v. *Baltimore & Ohio R.R.*, 652 F.2d 1012, 1020 (D.C. Cir. 1981); *Wyatt* v. *City of Boston*, 35 F.3d 13, 15 (1st Cir. 1994);

According to petitioner, Hughes's conduct towards her was frequent and humiliating, and his explicit demands to "see your titties" and his act of grabbing her head and "pull[ing] it to his crotch," C.A. App. 44 (Dep. of Vicki Crawford), Pet. App. 5a n.1, obviously went well beyond "simple teasing." *Faragher*, 524 U.S. at 788; cf. *Clark County Sch. Dist.* v. *Breeden*, 532 U.S. 268, 271 (2001) ("single incident" in which co-workers "chuckl[ed]" at job applicant's sexual statement was "at worst an 'isolated inciden[t]' that cannot remotely be considered 'extremely serious'") (brackets in original) (quoting *Faragher*, 524 U.S. at 788). A reasonable person in petitioner's position could believe that Hughes's conduct was sufficiently severe or pervasive to create an abusive working environment and thus constituted an employment practice made unlawful under Title VII. *Harris* v. *Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993).

Reed v. *A.W. Lawrence & Co.*, 95 F.3d 1170, 1178 (2d Cir. 1996); *Aman* v. *Cort Furniture Rental Corp.*, 85 F.3d 1074, 1085 (3d Cir. 1996); *EEOC* v. *Navy Fed. Credit Union*, 424 F.3d 397, 406-407 (4th Cir. 2005), cert. denied, 547 U.S. 1041 (2006); *Payne* v. *McLemore's Wholesale & Retail Store*, 654 F.2d 1130, 1138-1139 (5th Cir. 1981), cert. denied, 455 U.S. 1000 (1982); *Johnson*, 215 F.3d at 579-580; *Dey* v. *Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1457-1458 (7th Cir. 1994); *Gilooly* v. *Missouri Dep't of Health & Senior Servs.*, 421 F.3d 734, 742 (8th Cir. 2005); *Trent* v. *Valley Elec. Ass'n*, 41 F.3d 524, 526-527 (9th Cir. 1994); *Love* v. *RE/MAX of Am., Inc.*, 738 F.2d 383, 385 (10th Cir. 1984); *Rollins*, 868 F.2d at 400; cf. *Clark County Sch. Dist.* v. *Breeden*, 532 U.S. 268, 270 (2001) (declining to consider the issue but holding that employee's conduct was not protected opposition because "no one could reasonably believe" that the behavior the employee opposed was unlawful under Title VII).

B. The Participation Clause Protects An Employee Who Participates In An Employer's Internal Investigation Into Suspected Unlawful Employment Activity

The participation clause protects an employee against retaliation for her participation in "an investigation, proceeding, or hearing under this subchapter," *i.e.*, under Title VII. Congress's use of the phrase "investigation, proceeding, or hearing" indicates that it intended this clause to have great breadth as to the types of situations in which it would apply. And an employer-initiated investigation designed to detect or root out discrimination prohibited by Title VII is an investigation "under" the statute. The court of appeals erred when it held that Section 704(a)'s participation clause is limited to disclosures during an employer's internal investigation that occur only after the filing of an EEOC charge.

1. There is no basis for limiting the phrase "investigation * * * under this subchapter" to investigations conducted by the EEOC, and no court of appeals—including the Sixth Circuit in this case—has limited the statute in that fashion. In addition, Congress elsewhere in Title VII used language making clear its intent to address only investigations conducted by the Commission. See 42 U.S.C. 2000e-5(b) ("the Commission * * * shall make an investigation" of a charge), 2000e-8(a) (the Commission shall have access to evidence relating to unlawful employment practices "[i]n connection with any investigation of a charge"), and 2000e-9 (referring to "hearings and investigations conducted by the Commission or its duly authorized agents or agencies"). The fact that Congress did not use such Commission-specific language in Section 704(a) suggests that employer-initi-

ated investigations into conduct proscribed by Title VII would be covered. See *Burlington N. & Santa Fe Ry.* v. *White*, 126 S. Ct. 2405, 2412 (2006) ("We normally presume that, where words differ as they differ here, 'Congress acts intentionally and purposely in the disparate inclusion or exclusion.'") (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983)).

Here, the court of appeals did *not* attempt to limit the participation clause to EEOC's own irvestigations, but *did* limit it to internal investigations that follow an employee's filing of a charge with the EEOC. There is no textual basis for that limitation. Nothing in the statute's text indicates that protection under the participation clause applies *only* if an EEOC charge has been filed. To the contrary, while the statute explicitly extends to employees who file a "charge," it goes on to state that it applies as well to employees who "participated *in any manner* in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. 2000e-3(a) (emphasis added).

An employer-initiated investigation in response to allegations of conduct made unlawful by Title VII is an investigation "under" Title VII. The ordinary meaning of the word "under" in the context of a statute is "subject to" or "governed by" the statute in question. *Ardestani* v. *INS*, 502 U.S. 129, 135 (1991); see *The New Shorter Oxford English Dictionary* 3469 (1993) ("Subject to the authority, control, direction, or guidance of."); *Webster's Third New International Dictionary* 2487 (1986) ("required by: in accordance with: bound by"); *In re Hechinger Inv. Co. of Del., Inc.*, 335 F.3d 243, 252 (3d Cir. 2003) (Alito, J.) ("When an action is said to be taken 'under' a provision of law * * *, what is generally

meant is that the action is 'authorized' by the provision of law."). This Court's precedents interpreting Title VII leave no doubt that such investigations occur "under" Title VII because such investigations are subject to or governed by Title VII. See *Ardestani*, 502 U.S. at 135.

In a series of cases, this Court has held that Title VII imposes an affirmative duty on employers to investigate allegations of sexual harassment to avoid liability under the statute. For example, the Court in *Faragher* and *Ellerth* held that an employer can assert an affirmative defense to avoid vicarious liability for its supervisor's unlawful employment actions that do not result in a tangible employment action if (1) "the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and (2) "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer." *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765. Likewise, in *Kolstad*, 527 U.S. at 545-546, the Court held that an employer could avoid punitive damages under Title VII by showing that the supervisor was acting contrary to the employer's good faith efforts to comply with Title VII.

The decisions in *Faragher*, *Ellerth*, and *Kolstad* thus create strong incentives for employers to implement policies and procedures that would identify and correct instances of unlawful discrimination as a means to avoid liability or limit damages under Title VII. Not surprisingly, employers have responded to the decisions by implementing or expanding their policies and internal complaint procedures. Pet. Br. 24-28; see, *e.g.*, Amicus Chamber of Commerce Br. at 2, *Pennsylvania State Police* v. *Suders*, 542 U.S. 129 (2004) (No. 03-95) ("Fol-

lowing this Court's decisions in *Faragher* and *Ellerth* * * *, employers have made great strides in * * * implementing zero-tolerance policies, establishing user-friendly, effective internal complaint procedures, and vigorously investigating complaints of sexual and other harassment in the workplace."); Jathan W. Janove, *The* Faragher/Ellerth *Decision Tree*, 48 HR Mag. (Sept. 2003) ("There is no question that [*Faragher* and *Ellerth*] have increased employer understanding of the importance of preventive measures. They have contributed to the development of sound anti-harassment policies [and] procedures.").

When an employer conducts an internal investigation into whether a Title VII violation has occurred, either before or after the filing of an EEOC charge, the employer not only ensures that it qualifies for the affirmative defense recognized by this Court's Title VII cases, but also acts in conformity with Title VII's central objective to prevent and deter harm. See *Faragher*, 524 U.S. at 806 (Title VII's "'primary objective,' like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm.") (quoting *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417 (1975)); *Ellerth*, 524 U.S. at 764 ("Title VII is designed to encourage the [employer's] creation of antiharassment policies and effective grievance mechanisms."); *Kolstad*, 527 U.S. at 546 (recognizing "Title VII's objective of motivat[ing] employers to detect and deter Title VII violations"); accord *McKennon* v. *Nashville Banner Publ'g Co.*, 513 U.S. 352, 358 (1995).

Those principles also make clear that an employer's investigation into allegations of illegal conduct take place under Title VII's framework. Such an investiga-

tion is a fundamental and indispensable component of an employer's good faith efforts to comply with Title VII through the development and implementation of anti-harassment policies and complaint procedures. See *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors*, 2 EEOC Compl. Man. (BNA) Pt. V(C)(1), at 615:0107 (Oct. 2002) ("An anti-harassment policy and complaint procedure should contain, at a minimum * * * [a] complaint process that provides a prompt, thorough, and impartial investigation."). Accordingly, such investigations are subject to review in Title VII actions to ensure compliance with the employer's obligations as envisioned by this Court's decisions.[2]

In light of the importance of the internal investigation process to Title VII liability, it would make no sense to interpret the participation clause to leave employees unprotected in that process. Employee cooperation is essential to making such internal investigations effective, yet employee cooperation will hardly be forthcoming if employees are unprotected against retaliation in the event they disclose that their supervisors have engaged in unlawful practices. Without such protection, employees will avoid negative comments about

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[2] See, *e.g.*, *Beard* v. *Flying J, Inc.*, 266 F.3d 792, 799 (8th Cir. 2001) (no affirmative defense where employer interviewed only alleged harasser and victim, and not other employees who could have told of harassment, and where investigation ended only with warning to harasser); *Frederick* v. *Sprint/United Mgmt. Co.*, 246 F.3d 1305, 1314-1315 (11th Cir. 2001) (employer must act in reasonably prompt manner to respond to complaint); *Ogden* v. *Wax Works, Inc.*, 214 F.3d 999, 1007 (8th Cir. 2000) (no affirmative defense where employer performed cursory investigation that culminated with forcing plaintiff to resign, rather than imposing discipline on harasser).

their supervisors and the internal investigation will be robbed of its value. Because employer-initiated investigations attendant to an employer's anti-harassment policies and procedures are integral to achieving the statutory goals of promoting employer compliance and avoiding harm, and because those internal investigations will not perform the function envisioned by *Faragher* and *Ellerth* if the candor of cooperating employees is unprotected, such investigations are fairly considered to be conducted "under" Title VII.

2. In light of those principles, when respondent's legal department launched an investigation into Hughes's conduct, employees cooperating in that investigation participated in an investigation "under" Title VII and were entitled to protection under the participation clause. Whether or not a victim of Hughes's conduct had filed a formal charge at the point of petitioner's interview does not change the fact that the investigation was within the purview of Title VII. Indeed, if one of respondent's employees sued respondent based on Hughes's conduct, respondent presumably would point to the investigation as part of its defense to vicarious liability. In such a case, respondent's defense under *Faragher* and *Ellerth* would not turn on whether the charge had been filed before petitioner's interview. Employers should not be permitted to use such an investigation as a shield to liability under Title VII while at the same insisting that the absence of an EEOC charge precludes any liability to retaliation for participation in the very same investigation.

Conditioning protection against retaliation on the filing of an EEOC charge would lead to the perverse result of requiring employers to conduct internal inves-

tigations to identify potentially unlawful employment practices (even in the absence of formal EEOC charges having been filed), but denying the full protections of Title VII to the witnesses who participate in those investigations and assist their employers in uncovering potentially unlawful employment practices. Such a result would flout the purposes of a statute that "depends for its enforcement upon the cooperation of employees who are willing to * * * *act as witnesses*," and accordingly whose anti-retaliation provision must be interpreted "to provide *broad* protection from retaliation" to "assure [employee] cooperation." *White*, 126 S. Ct. at 2414 (emphasis added).

The court of appeals' construction of the participation clause, particularly when coupled with the court's crabbed construction of the opposition clause, would also permit employers to use investigations under facially appropriate anti-harassment policies as a means of identifying and rooting out employees who have knowledge of discrimination in the workplace, as opposed to identifying and fostering action against those who discriminate. Cf. *Valerio* v. *Putnam Assoc., Inc.*, 173 F.3d 35, 43 (1st Cir. 1999) (limiting the protections of the anti-retaliation provision of the Fair Labor Standards Act to filing of judicial or agency complaints "would have the bizarre effect of both discouraging early settlement attempts and creating an incentive for the employer to fire an employee as soon as possible after learning the employee believed he was being treated illegally"). Indeed, in this case, the employer fired three of the witnesses (including petitioner) who cooperated with the investigation, but ultimately allowed the

subject of the investigation (Mr. Hughes) to remain in place. Pet. App. 5a.

For similar reasons, the court of appeals erred in concluding that protecting petitioner from retaliation under Section 704(a)'s participation clause would unjustifiably burden employers who "proactively" launch an investigation before an EEOC charge is filed. Pet. App. 10a. As discussed, this Court's decisions require proactive efforts on the part of employers regardless of whether an employee has instituted formal proceedings with the EEOC arising out of the conduct under investigation. In any event, employers have no legitimate interest in retaliating against employees who disclose conduct made unlawful under Title VII, either *before or after* an EEOC charge is filed. And, indeed, employers interested in rooting out discrimination in the workplace will suffer themselves if employees do not participate in the internal complaint and investigation process out of fear of retaliation.

3. The court of appeals' conclusion that the participation clause protects an employee's participation in an investigation only *after* the filing of an EEOC charge comports with decisions of other circuits to have considered the issue. *Abbott*, 348 F.3d at 543; *EEOC* v. *Total Sys. Servs., Inc.*, 221 F.3d 1171, 1174 (11th Cir. 2000); *Byers* v. *Dallas Morning News*, 209 F.3d 419, 428 (5th Cir. 2000); *Brower* v. *Runyon*, 178 F.3d 1002, 1006 (8th Cir. 1999); *Vasconcelos* v. *Meese*, 907 F.2d 111, 113 (9th Cir. 1990); *Booker* v. *Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1313 (6th Cir. 1989). Those decisions generally have reasoned that the participation clause should be construed to protect only those employees "who utilize[] the tools provided by Congress to protect

[their] rights" and "to protect [employees'] access to machinery under Title VII." See, *e.g.*, *Meese*, 907 F.2d at 113; accord *Runyon*, 178 F.3d at 1006 ("The participation clause is designed to ensure that Title VII protections are not undermined by retaliation against employees who use the Title VII process to protect their rights."). But that construction ignores the reality that Title VII's anti-retaliation provision protects witnesses just as much as the direct victims of discrimination and that internal investigations are an integral part of Title VII—whether or not a charge has been filed with the EEOC.

The Eleventh Circuit in *Total System Services*, 221 F.3d at 1174 n.3, also reasoned that Congress did not intend "to protect absolutely every sexual harassment complaint made to an employer * * * as a protected activity under the participation clause," because doing so would render the opposition clause "largely meaningless." That is not correct. As noted earlier, p. 14, *supra*, giving the participation and opposition clauses their natural breadth does not render either clauses superfluous. Employees may engage in a wide variety of "opposing" conduct independent of participating in an investigation, such as complaining to "management, unions, other employees, or newspapers[] about allegedly unlawful practices; refusing to obey an order because the worker thinks it is unlawful under Title VII; and opposing unlawful acts by persons other than the employer—*e.g.*, former employers, union, and co-workers." *Johnson*, 215 F.3d at 579-580; accord 2 EEOC Compl. Man. *Section 8: Retaliation* (May 20, 1998) <http://

www.eeoc.gov/policy/docs/retal.pdf>.[3] In any event, as also noted earlier, p. 14, *supra*, the two subsections of Section 704(a), are best read, not as a mutually exclusive sub-species of retaliation, but as complementing provisions designed to ensure that all retaliation that could reasonably deter the filing of Title VII complaints is prohibited. The approach of the court of appeals ignores that notion and creates an inexplicable enforcement gap in the statute.

C. Failing To Protect Employees Who Disclose Unlawful Activity During An Employer's Internal Investigation Would Create An Unwarranted Gap In Section 704(a)

1. Protecting employees from retaliation for disclosing unlawful conduct during an employer-initiated investigation is necessary to ensure the effective enforcement of Title VII. In that regard, the decision below creates an inexplicable gap in Title VII's anti-retaliation provision. In light of the integral role internal investigations play in Title VII even before a charge is filed, it makes no sense to conclude that Congress intended to leave employees protected by *neither* clause of Section 704(a).

As this Court recently explained in *White*, 126 S. Ct. at 2412, the purpose of the anti-retaliation provision is to secure a discrimination-free workplace "by preventing an employer from interfering (through retaliation)

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[3] The opposition clause thus covers, inter alia, sending letters to employers objecting to certain employment practices, *O'Neal* v. *Ferguson Constr. Co.*, 237 F.3d 1248, 1255 (10th Cir. 2001); *Johnson*, 215 F.3d at 579-580, and failing to deter a subordinate from filing a complaint, *McDonnell* v. *Cisneros*, 84 F.3d 256, 262 (7th Cir. 1996).

with an employee's efforts to secure or advance enforcement of [Title VII's] basic guarantees." Title VII thus "forbids discrimination against * * * employees for attempting to protest or correct allegedly discriminatory conditions of employment." *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 796 (1973). This Court's precedents accordingly hold that Title VII should be interpreted to "assure * * * cooperation" from employees in achieving Title VII's objectives. *White*, 126 S. Ct. at 2414.

Effective enforcement of Title VII's protections depends "upon the cooperation of employees who are willing to * * * act as witnesses" and who feel "free to approach officials with their grievances." *White*, 126 S. Ct. at 2414 (quoting *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960)); cf. *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 180 (2005) (explaining that if retaliation were permitted, "individuals who witness discrimination would be loath to report it," and the discriminatory conduct "might go unremedied as a result"). In the absence of protection against retaliation, witnesses and victims naturally would be reluctant to participate in an investigation into unlawful conduct, which, in turn, would undermine Title VII's purpose to spur employers' efforts to deter and detect unlawful discrimination in the workplace.

The court of appeals' decision unjustifiably puts an employee asked to disclose specific incidents of unlawful discrimination in a pre-charge internal investigation in an untenable position. The employee risks retaliation for disclosing the unlawful activity or for refusing to cooperate with the employer's investigation. The only safe course for the employee would be to provide only inno-

cuous information about the supervisor, even when discrimination is rampant. There is no reason to believe that Congress intended to place employees in that position. Nor is there any reason to believe that Congress intended to create a system in which employees have a *disincentive—i.e.*, the possibility of retaliation not covered by Title VII—to cooperate with ongoing investigations designed to root out discrimination and, thus, avoid potential liability under Title VII. The statutory scheme can work as intended only if persons feel secure in reporting discrimination when they believe it exists, and that sense of security is unlikely in the absence of adequate protection against retaliation.

This Court's decision in *NLRB* v. *Scrivener*, 405 U.S. 117 (1972), is instructive. In *Scrivener*, this Court construed the National Labor Relations Act's anti-retaliation provision, which prohibited retaliation against an employee "because he has filed charges or given testimony under this subchapter," 29 U.S.C. 158(a)(4), to protect an employee who cooperated with a preliminary investigation by the National Labor Relations Board into an unfair labor practice charge, but who did not file the charge or testify at a formal hearing on the charge. The Court explained that interpreting the statute to protect those employees who participate in an investigation's preliminary stages "squares with the practicalities" of the investigative process, *Scrivener*, 405 U.S. at 123, and that "[w]hich employees receive statutory protection should not turn on * * * events that have no relation to the need for protection," *id.* at 123-124. That reasoning similarly applies here: protecting employees who disclose unlawful employment practices during an employer's internal investigation only if and after an

EEOC charge has been filed leaves an inexplicable gap in Title VII's protective reach for reasons that are not tethered to the statutory text and are wholly unrelated to the need for protection.

This Court in *Scrivener* also reasoned that failing to protect employees who participate in the investigative stage is necessary "to prevent the Board's channels of information from being dried up by employer intimidation of prospective complainants and witnesses." 405 U.S. at 122. That concern is present here as well: if employers are free to retaliate against witnesses in internal investigations, at least until a charge has been filed, employees who are intimidated from disclosing unlawful employment practices during an employer-conducted investigation may well be reluctant to vary from what they disclosed to the employer if later approached by the EEOC after a charge has been filed. Such employees may continue to be reluctant to speak candidly out of fear that their truthfulness will be questioned or that they will be accused of withholding information in the initial investigation.

2. The court of appeals observed that an employer that retaliates against an employee who has participated in an internal investigation might be acting unreasonably and would risk losing its affirmative defense to a claim under Title VII's anti-discrimination provisions. Pet. App. 9a-10a. That observation merely underscores, however, that employer-sponsored investigations are governed by and subject to Title VII and therefore take place "under" the statute. See pp. 17-20 & n.2, *supra*. In any event, the court's observation offers no relief to the victims of *retaliation* who would have no cause of action to vindicate that distinct injury under the statute.

It is telling that where Congress has addressed the problem of retaliation directly, it provided a distinct remedy for the victims of retaliation, and did not merely eliminate a defense in the underlying discrimination action. And if no victim of harassment files suit (*e.g.*, out of fear of reprisal), both the harassment and the retaliation would occur without redress. Moreover, the court of appeals' exclusive focus on the *employer's* motivations ignores the obvious chilling effect that its rule would have on an employee's willingness to cooperate with the employer's investigation. In short, no policy justification supports the court of appeals' crabbed construction of both clauses of Section 704(a).

D. The EEOC's Interpretation Of Title VII's Anti-Retaliation Provision Warrants Deference

The EEOC consistently has taken the view that an employee who complains of unlawful employment practices in an employer-initiated investigation is protected from retaliation under Section 704(a). Thus, the EEOC has stated its view that such an employee is protected under the opposition clause, 2 EEOC Compl. Man., *Section 2, Threshold Issues* (May 12, 2000) <http://www.eeoc.gov/policy/docs/threshold.html>, as well as under the participation clause, EEOC Br., *EEOC* v. *Total Sys. Servs., Inc.*, 221 F.3d 1171 (11th Cir. 2000) (No. 99-13196JJ); accord http://www.eeoc.gov/types/retaliation.html ("Examples of participation include * * * Cooperating with an internal investigation of alleged discriminatory practices"). Under this Court's decisions, such EEOC guidance, while not controlling, reflects "a body of experience and informed judgment to which courts and litigants may properly

resort for guidance" and, as such, is at least "entitled to a 'measure of respect'" by this Court. *Federal Express Corp.* v. *Holowecki*, 128 S. Ct. 1147, 1156 (2008) (quoting *Bragdon* v. *Abbott*, 524 U.S. 624, 642 (1998) and *Alaska Dep't on Envtl. Conservation* v. *EPA*, 540 U.S. 461, 488 (2004)); *National R.R. Passenger Corp.* v. *Morgan*, 536 U.S. 101, 110 n.6 (2002); *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U.S. 57, 65 (1986); *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944).

The interpretation embodied in the EEOC's Compliance Manual and its *Total System* amicus brief has been in place for more than seven years and reflects the agency's consistent position on the question presented. Cf. *Holowecki*, 128 S. Ct. at 1156 (deferring to interpretive statement in an agency memorandum that "has been binding on EEOC staff for at least five years"). Moreover, in the wake of this Court's decisions in *Ellerth*, *Faragher*, and *Kolstad*, the EEOC determined that Section 704(a) protects employees in petitioner's position because employer investigations into allegations of unlawful employment practices are an indispensable component of an employer's good faith efforts to comply with Title VII and because broad protection to employees who cooperate in such investigations is consistent with the expansive language used by Congress and is critical to ensuring the effective enforcement of the statute. Because those judgments are based on the EEOC's extensive experience and expertise administering Title VII, they are entitled to respect and, at a minimum, should tip the balance in the event that this Court has any doubt as to the proper interpretation of Section 704(a).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 06-1595

IN THE

Supreme Court of the United States

VICKY S. CRAWFORD,

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v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENT

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Respondent.

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENT

STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business

[1] Pursuant to Sup. Ct. R. 37.6, amicus notes that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief through consent letters filed with the Clerk's Office.

federation. It represents an underlying membership of more than three million businesses and organizations of every size, in every sector, and from every region of the country. The Chamber actively represents the interests of its members in court on issues of widespread concern to the business community. The Chamber has participated as amicus curiae in numerous cases before the Court, including many employment discrimination cases. *See, e.g.*, *Ledbetter* v. *Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007); *Burlington Northern & Santa Fe Ry. Co.* v. *White*, 126 S. Ct. 2405 (2006); *Kolstad* v. *American Dental Ass'n*, 527 U.S. 526 (1999); *Burlington Indus., Inc.* v. *Ellerth*, 524 U.S. 742 (1998). This case concerns the scope of the retaliation provision in Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e, *et seq.*

Because Title VII covers virtually all employers with fifteen or more employees, 42 U.S.C. § 2000e(b), most of the Chamber's members are subject to Title VII. Retaliation claims are among the most frequent and fact-intensive claims employers face, and the Court's decision in this case will have profound implications for the business community, particularly with respect to how and when internal investigations are conducted. *See* Sylvia A. Bier, American Bar Ass'n, *Protect Against the Surge of Employee Retaliation Claims: Understanding Title VII and Its Application to Recent EEOC Cases*, 36 The Brief 3, at 15, (Spring 2007) (noting that from 1997-2006, retaliation charges filed with the EEOC grew steadily from 22.6 percent to 29.8 of all charges filed). In addition, because Title VII's retaliation provision is nearly identical to those contained in

other retaliation provisions, including the Americans with Disabilities Act, 42 U.S.C. § 12203(a), and the Age Discrimination in Employment Act, 29 U.S.C. § 623(d), the impact of this case on employers throughout the Nation is even greater. Accordingly, the Chamber has a vital interest in the Court's resolution of the issues in this case.

INTRODUCTION

Petitioner Crawford was interviewed by her employer's human resources department in connection with an internal sexual harassment complaint. Crawford was not the complainant. Several months after the investigation, Crawford was placed on administrative leave and then fired after outside auditors discovered serious book-keeping irregularities in the department she managed. Crawford subsequently filed suit against her former employer, the respondent, contending that she had been fired in retaliation for answering the human resource investigator's inquiries months earlier related to another employee's sexual harassment complaint. Concluding that Crawford had neither "participated" in a statutory proceeding nor "opposed" discrimination, as Title VII requires before its protections against retaliation attach, the Sixth Circuit affirmed the dismissal of her federal retaliation claim. Its decision was correct and should be affirmed.

SUMMARY OF ARGUMENT

Title VII declares that it is unlawful to discriminate against an employee "because he has opposed any practice made an unlawful employment practice by this subchapter," or "because he has

made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a).[2] These carefully crafted statutory prohibitions are known respectively as the "opposition clause" and the "participation clause."

Petitioner Crawford cannot claim protection under either clause. She did not "participate" in a proceeding "under this subchapter," because her employer's internal misconduct investigation was not such a statutory proceeding. The "participation" clause is triggered only after a charge is filed with the EEOC; the courts of appeal to have considered the question *all* have held as much.

Nor, on this factual record, can petitioner claim protection under the "opposition" clause. She did not actively object to any sexual misconduct in the office; she simply cooperated with an internal investigation. Her cooperation with her employer's human resources department was commendable, but mere cooperation in an internal inquiry does not immunize petitioner from later adverse action. Title VII's "opposition" clause means just what it says: it protects employees who actively *oppose* unlawful employment practices, not those who passively cooperate in internal inquiries.

The current legal framework fully protects legitimate claimants and complainants from

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[2] Petitioner uses the phrase "under this title" instead of "under this subchapter," Pet. Br. 1 n.1; but it is clear that Section 704(a) refers to the Equal Employment Opportunities provisions found at 42 U.S.C. § 2000e– § 2000e-17.

suffering adverse action after registering objections to unlawful employment practices. The far more expansive interpretation petitioner proposes offers little if any more protection for legitimate retaliation complainants; but it would go a long way toward immunizing underperforming employees from remedial action—potentially for years after the fact—merely for answering questions posed to them in a standard internal human-resources inquiry. The judgment of the Sixth Circuit should be affirmed.

ARGUMENT

I. CRAWFORD'S CONDUCT DID NOT QUALIFY AS PARTICIPATION IN AN INVESTIGATION, PROCEEDING, OR HEARING UNDER TITLE VII.

A. The "Participation" Clause Broadly Protects Employees After Title VII Enforcement Proceedings Have Been Initiated—Not Before.

1. Title VII protects access to the statutory "machinery available to seek redress for civil rights violations and * * * protect[s] the operation of that machinery once it has been engaged." *Booker* v. *Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1313 (6th Cir. 1989); *accord Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 346 (1997) (a primary purpose of the retaliation clause is "maintaining unfettered access to [Title VII's] remedial mechanisms"). "Accordingly, any activity by the employee prior to the instigation of statutory proceedings is to be considered pursuant to the opposition clause," not the participation clause. *Booker*, 879 F.2d at 1313. Mere "internal correspondence with one's employer

does not sufficiently invoke the statutory machinery available under [Title VII] to constitute the filing of a complaint or a charge." *Id.*

In the nearly two decades since the Sixth Circuit offered these observations about Title VII's retaliation provision, every court of appeals to have considered the same question has reached the same answer. An employee can only "*participate*" in a proceeding, investigation, or hearing under Title VII after a charge has been filed with the EEOC. *See, e.g.*, *EEOC* v. *Total Sys. Servs., Inc.*, 221 F.3d 1171, 1174 (11th Cir. 2000) (participation clause "protects proceedings and activities which occur in conjunction with or after the filing of a formal charge with the EEOC"); *Vasconcelos* v. *Meese*, 907 F.2d 111, 113 (9th Cir. 1990) (" 'The purpose of section 2000e-3's participation clause is to protect the employee who utilizes the tools provided by Congress to protect his rights' ") (quoting *Sias* v. *City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978)); *Tuthill* v. *Consolidated Rail Corp.*, 1997 WL 560603, at *3 (E.D. Pa. Aug. 26, 1997) ("In order to establish a claim under the 'participation clause,' the investigation, proceeding or hearing must fall within the confines of the procedures set forth in Title VII."), *aff'd*, 156 F.3d 1225 (3d Cir. 1998); *accord Byers* v. *Dallas Morning News, Inc.*, 209 F.3d 419, 428 (5th Cir. 2000); *Brower* v. *Runyon*, 178 F.3d 1002, 1005 (8th Cir. 1999); *Cuffee* v. *Tidewater Cmty. Coll.*, 409 F. Supp. 2d 709, 720 (E.D. Va.), *aff'd*, 2006 WL 2310733 (4th Cir. 2006); *Berroth* v. *Farm Bureau Mut. Ins. Co.*, 232 F. Supp. 2d 1244, 1250 (D. Kan. 2002).

These courts all reached the same conclusion after analyzing the plain language of Title VII's participation clause, which requires that participation be in "an investigation, proceeding, or hearing *under this subchapter*." 42 U.S.C. § 2000e-3(a). An investigation "under this subchapter" is an investigation conducted by the EEOC or its state and local counterparts, as the statute's structure makes clear. Section 2000e-3(a) refers to retaliation for conduct taken "in enforcement proceedings," and in particular, "in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a). Section 2000e-5 then spells out the statutory "[e]nforcement provisions," which include charges filed with and investigated by the EEOC, § 2000e-5(b), state and local enforcement proceedings, § 2000e-5(c), (d), civil actions filed by the EEOC or the person aggrieved, § 2000e-5(f), and appeals of civil actions, § 2000e-5(j). There is no mention in Title VII's enforcement provisions—or anywhere else in Title VII—of investigations initiated by an employer outside of any EEOC or state or local proceeding.[3]

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[3] Further confirming that the term "investigation" in the retaliation provision does not refer to employer-initiated investigations, the section of Title VII entitled "Investigations" deals only with investigations by "the Commission or its designated representative" and state and local agencies administering state fair employment laws. 42 U.S.C. § 2000e-8; *accord* 29 C.F.R. § 1601.15 (investigation "shall be made by the Commission, its investigators, or any other representative designated by the Commission").

Title VII's statutory language thus "specifically limits the participation clause of section 2000e-3 to proceedings 'under this subchapter.' Accusations made in the context of charges before the Commission are protected by statute; charges made outside of that context" do not qualify as protected activity under the participation clause. *Vasconcelos*, 907 F.2d at 113; *see Burlington Northern & Santa Fe Ry. Co.* v. *White*, 126 S. Ct. 2405, 2408 (2006) (describing participation clause as applying when an individual participated in "a Title VII proceeding or investigation"); *University of Pennsylvania* v. *EEOC*, 493 U.S. 182, 192 (1990) (rejecting interpretation of Title VII provision that "simply cannot be reconciled with the plain language of the text" of that provision); *Gilooly* v. *Missouri Dep't of Health & Senior Servs.*, 421 F.3d 734, 742 (8th Cir. 2005) (Colloton, J., concurring in part and dissenting in part) ("[T]he clause protects only participation 'under this subchapter,' so participation in an employer's internal investigation that is independent of the 'subchapter,' *i.e.*, not pursuant to an investigation by the EEOC or its designee, is not covered.").

Employees who participate in an employer's internal investigation prior to an EEOC charge therefore are not protected by the participation clause. Employees who participate in an investigation after an EEOC charge has been filed, in contrast, come within that clause's protections. *See Abbott* v. *Crown Motor Co.*, 348 F.3d 537, 543 (6th Cir. 2003); *Clover* v. *Total Sys. Servs., Inc.*, 176 F.3d 1346, 1352-53 (11th Cir. 1999). There is a good reason for this distinction. In conducting its investigation, the EEOC can consider evidence gathered by an employer. *See* 29 C.F.R. § 1601.15(a).

"Because the information the employer gathers as part of its investigation *in response to the notice of charge of discrimination* will be utilized by the EEOC, it follows that an employee who participates in the employer's process of gathering such information is participating, in some manner, in the EEOC's investigation." *Clover*, 176 F.3d at 1352-53.

2. Neither petitioner nor the government suggests that any court has adopted the position they advocate before this Court. And the courts' uniform interpretation of the plain language of the participation clause does not, as petitioner and the government suggest, leave employees unprotected from retaliation for statements made during an employer-initiated internal investigation. Courts have been equally consistent in holding that the opposition clause protects employees who "oppose" an unlawful employment practice prior to the initiation of Title VII proceedings. *See, e.g.*, *McNair* v. *Computer Data Sys., Inc.*, 1999 WL 30959, at *5 (4th Cir. Jan. 26, 1999) ("Because appellant alleges that [the defendant] retaliated against her for actions taken *before* she filed her first EEOC charge, however, we need only consider this claim under the terms of the section's 'opposition clause.' ") (emphasis in original); *Wilson* v. *Delta State Univ.*, 2005 WL 1939678, at * 2 (5th Cir. 2005). Indeed, the position advocated by petitioner and the Solicitor General would eviscerate the opposition clause; all allegations touching upon Title VII that were expressed to an employer during an internal investigation would be transformed into statutorily protected "participation" under Title VII. *See EEOC* v. *Total Sys. Servs.*, 221 F.3d at 1174 n.3 (noting that if every internal complaint was "protected activity

under the participation clause," then "[t]he statute's opposition clause would be rendered largely meaningless").

3. Petitioner's proposed expansion of the participation clause also would be particularly troublesome for employers; the protections offered by the participation clause are broader than those offered by the opposition clause. *See, e.g.*, *Slagle* v. *County of Clarion*, 435 F.3d 262, 266 (3d Cir. 2006) (participation clause "offers much broader protection to Title VII employees than does the 'opposition clause.' "). For example, under the "exceptionally broad protections of the participation clause," an employee is protected no matter whether "the contents of the charge are malicious or defamatory as well as wrong." *Johnson* v. *University of Cincinnati*, 215 F.3d 561, 582 (6th Cir. 2000) (internal quotation marks and citation omitted); *accord Wyatt* v. *City of Boston*, 35 F.3d 13, 15 (1st Cir. 1994) (there is no requirement under participation clause that "the charges be valid, nor even an implied requirement that they be reasonable") (citation omitted); *Pettway* v. *American Cast Iron Pipe Co.*, 411 F.2d 998, 1007 (5th Cir. 1969) (participation clause's protections apply even where content of EEOC charge is incorrect or malicious). Under the opposition clause, by contrast, protection turns on whether the employee's opposition was based on a good faith, objectively reasonable belief that the conduct being opposed violates Title VII. *See Clark County Sch. Dist.* v. *Breeden*, 532 U.S. 268, 270 (2001); *Brannum* v. *Missouri Dep't of Corrections*, 518 F.3d 542, 547 (8th Cir. 2008) (holding that "in the opposition clause context," an employee must prove that she had a "good faith, reasonable belief"

that the conduct violated Title VII) (internal quotation and citation omitted); *Jordan* v. *Alternative Resources Corp.*, 458 F.3d 332, 341 (4th Cir. 2006) (same); *Little* v. *United Tech., Carrier Transicold Div.*, 103 F.3d 956, 960 (11th Cir. 1997) (same).[4]

Adopting petitioner's position that anyone who participates in an internal employer-initiated investigation will receive broad participation clause protection thus would significantly expand the scope of the participation clause. Where participants in an employer-initiated investigation traditionally have been protected from retaliation for registering good-faith, reasonable opposition to unlawful employment practices, petitioner's position would result in broad

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[4] Petitioner suggests that the Court should adopt her position so that participants in an employer-initiated internal investigation can be protected from retaliation regardless of whether they lie, act in bad faith, or provide objectively unreasonable responses to the employer's internal investigator. Pet. Br. 35-36. But "Title VII was not designed to arm employees with a tactical coercive weapon under which employees can make baseless claims simply to advance their own retaliatory motives and strategies." *Mattson* v. *Caterpillar, Inc.*, 359 F.3d 885, 890 (7th Cir. 2004) (internal quotation and citation omitted). In any event, petitioner is incorrect to suggest that the good-faith determination turns on whether the employee's assessment of the unlawful employment practice was "inaccurate." Pet. Br. 36. It does not. Title VII affords significant protections to employees who inaccurately, but in good faith, believe an unlawful employment practice has occurred. *See, e.g., Dea* v. *Washington Suburban Sanitary Comm'n*, 2001 WL 672046, at *3 (4th Cir. June 15, 2001).

participation-clause protection for all employees involved in the investigation, even if no employee had filed an EEOC charge, and even if the employee's statements were neither objectively reasonable *nor* made in good faith. That outcome contravenes the participation clause's plain language and purpose.

B. The EEOC's Compliance Manual—In Contrast To Its Litigation Position—Comports With The Courts Of Appeals' Unanimous Interpretation Of The Participation Clause.

The Solicitor General suggests that the EEOC interprets the participation clause in a way that supports Petitioner. Gov. Br. 29. The EEOC's Compliance Manual shows otherwise.

The Compliance Manual identifies the first element of retaliation under the participation clause as "participation in a covered proceeding." EEOC Compliance Manual § 8 at 8-3 (May 20, 1998). The Manual further identifies the employees the participation clause protects:

> This protection applies to individuals challenging employment discrimination under the statutes enforced by EEOC in *EEOC proceedings*, in *state administrative or court proceedings*, as well as in *federal court proceedings*, and to individuals who testify or otherwise participate in *such proceedings*.

Id. at 8-9 (emphasis added). Thus, unless an individual is participating in "such proceedings"—*i.e.*, EEOC proceedings, state administrative proceedings, or state or federal court proceedings—

the participation clause is not at issue. The Manual reiterates that the retaliation provision protects "against retaliation for participating *in the charge process*." *Id.* at 8-10 (emphasis added). It applies to "all individuals who participate *in the statutory complaint process*." *Id.* (emphasis added).

To the extent the EEOC now argues that employer-initiated investigations come "under Title VII" so long as they touch upon conduct proscribed by Title VII, its litigation "position is, for the reasons discussed above, inconsistent with the plain language of the statute at issue. '[N]o deference is due to agency interpretations at odds with the plain language of the statute itself.' " *Gregory* v. *Ashcroft*, 501 U.S. 452, 485 n.3 (1991) (White, J., concurring in part and dissenting in part) (rejecting EEOC's attempt to rely on its litigation position in recent lawsuits) (quoting *Public Employees Retirement Sys. of Ohio* v. *Betts*, 492 U.S. 158, 171 (1989)). This Court has previously declined to defer to the EEOC's litigation position before the Court when that position is inconsistent with those previously taken by the agency and lacks support in the plain language of the statute. *See EEOC* v. *Arabian Am. Oil Co.*, 499 U.S. 244, 257-258 (1991).

C. The *Faragher/Ellerth* Affirmative Defense Has No Bearing On The Scope Of Protection Offered By The Participa-tion Clause.

The Solicitor General asserts that an employer-initiated investigation is one "under" Title VII—even though at the same time it narrowly defines "under" as meaning "subject to" or "governed by" Title VII.

Gov. Br. 17; *see also* Pet. Br. 23-24.[5] But an employer's internal investigation mechanisms are not "subject to" or "governed by" Title VII. Employers are free to initiate and conduct internal investigations any way they choose. The employer—not any statutory provision of Title VII—determines the scope of any employer-initiated investigation and sets policy on conducting internal investigations.

The sole argument offered in support of the Solicitor General's and petitioner's position is that in one specific subset of Title VII cases—where an employee alleges the employer is vicariously liable for a supervisor's sexual harassment even though no tangible employment action has occurred—some employers can assert the affirmative defense outlined in *Faragher* v. *City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998). There, the Court explained that an employer can avoid vicarious liability in a claim that a supervisor's sexual harassment created a hostile work environment not resulting in a tangible employment action if two requirements are met: the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior and the plaintiff unreasonably failed to take

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[5] Petitioner (but not the Solicitor General) argues that employer-initiated internal investigations are "under" Title VII because employers "created" such practices "in response to Title VII," Pet. Br. 24, but that argument fares no better. . Employers have taken many actions in response to Title VII in an attempt to ensure more welcoming, productive workplace environments. That is no basis for concluding that every employer-initiated and employer-specific policy is "under Title VII."

advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. But the availability of that affirmative defense in a subset of hostile work environment claims has nothing to do with the scope of Title VII's retaliation provision. This court has already confirmed as much. *See Burlington Northern*, 126 S. Ct. at 2413 (noting that *Ellerth* and *Faragher* "did not discuss the scope of the general anti-discrimination provision"; in fact they "did not mention Title VII's anti-retaliation provision at all"), *Pennsylvania State Police* v. *Suders*, 542 U.S. 129, 143-144 (2004) (explaining that *Ellerth* and *Faragher* divide hostile work environment claims into two categories, one in which the employer is strictly liable because a tangible employment action is taken and one in which the employer can make an affirmative defense). *See also EEOC* v. *Total Sys. Servs., Inc.*, 221 F.3d at 1174 n.3 (rejecting EEOC's argument that *Faragher* and *Ellerth* require that the participation clause be interpreted to encompass taking part in an employer's internal investigation that is not prompted by, or part of, an EEOC charge).

There are at least two additional reasons to reject the argument that *Faragher* and *Ellerth* require interpreting the participation clause to protect all employees who provide information in an employer-initiated investigation. *First*, the argument ignores the opposition clause, which protects employees who oppose an employment practice that they reasonably believe violates Title VII. *Second*, an employer who retaliates against participants in a pre-charge internal harassment investigation not related to a tangible employment action would risk losing its ability to assert the *Faragher/Ellerth* affirmative

defense, which is available only to employers who "exercise[] reasonable care to prevent and correct promptly any sexually harassing behavior." *Ellerth*, 524 U.S. at 765. The rogue employer who retaliates against employees for participating in an internal investigation involving allegations of harassment will likely have a hard time proving that it exercised reasonable care to prevent and correct harassing behavior. *See Crawford* v. *Metropolitan Gov't of Nashville & Davidson County*, 2006 WL 3307507, at *4 (6th Cir. 2006) ("Certainly, a policy or practice of firing a person who testified negatively during an investigation into complaints of sexual harassment would not be 'reasonable.' ").[6]

II. CRAWFORD'S INTERVIEW RESPONSES DID NOT CONSTITUTE PROTECTED "OPPOSITION."

Section 704(a)'s opposition clause forbids an employer from retaliating against an employee because that employee "opposed any practice made an unlawful employment practice by this title." "Oppose" means "to confront with hard or searching objections" or "to offer resistance, to contend against or forcefully withstand." Webster's Third New International Dictionary Unabridged 1583 (2002); *see also* Random House College Dictionary Unabridged

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[6] Petitioner speculates about a flood of additional EEOC claims should the Court decline to adopt her view of the participation clause. *See* Pet. Br. 37-38. This conjecture has no basis. No court in the country has adopted the position she advocates; this Court's agreement with the unanimous view of the lower courts would not change the law from where it currently stands and has stood for decades.

933 (1980) (explaining that "to oppose is mainly to fight against, in order to thwart, certain tendencies, procedures, or what one does not approve").

The opposition clause sets a low threshold—but it is a threshold: it requires the employee to "convey to the employer his or her concern that the employer has engaged in a practice made unlawful" by Title VII. *Hinds* v. *Sprint United Mgmt. Co.*, __ F.3d __, 2008 WL 1795059, at *11 (10th Cir. Apr. 22, 2008). *See also Mongelli* v. *Red Clay Consol. School Dist. Bd. of Educ.*, 491 F. Supp. 2d 467, 483 (D. Del. 2007) (plaintiff must engage in "active 'opposition' to an unlawful employment practice for purposes of a Title VII retaliation claim").

Petitioner did no such thing. Indeed, petitioner apparently never mentioned Mr. Hughes's behavior until she was called into the investigatory interview; and even then, she limited her remarks to assertedly factual responses to the interviewer's questions. The Sixth Circuit therefore correctly concluded that petitioner did not engage in protected "opposition" because her conduct was limited to "cooperating with Metro's investigation into Hughes by appearing for questioning" at Metro's request and "relating unfavorable information." *Crawford*, 2006 WL 3307507, at *3. As the Sixth Circuit explained, conduct by an employee that "active[ly]," "overt[ly]," or "consistent[ly]" expresses an objection to an employment practice would clearly fall within the opposition clause, so long as the employee has a good faith, objectively reasonable belief the practice was discriminatory. *Id.* at *2-*3. Nothing in this record shows that petitioner did anything more than cooperate in an internal investigation by providing

assertedly factual information in response to the investigator's questions.

Courts have not hesitated to find an absence of protected opposition in similar circumstances. As the court explained in *Campbell* v. *Dominick Finer Foods, Inc.*, 85 F. Supp. 2d 866 (N.D. Ill. 2000):

> It is undisputed that Plaintiff never mentioned the [racially] offensive remarks to Dominick's until he was called into this investigatory meeting and asked what he heard. Only then did Plaintiff relate the remark. But even then he did not oppose it or otherwise object to it. Plaintiff thus was not "opposing" an action taken by his employer * * * . [*Id.* at 874.]

See also Fox v. *Eagle Distrib. Co.*, 510 F.3d 587, 592 (6th Cir. 2007) (court will not find protected "opposition" when it would "require reading something into the record that simply is not there").

Petitioner nonetheless contends that mere *cooperation* triggers the *opposition* clause. And the Solicitor General—now relying on the EEOC Compliance Manual it ignores during its discussion of the participation clause—also argues that the Court should infer "opposition" from mere disclosure. But Congress chose to use the verb "oppose"; the relevant provision is the "opposition clause," not the "cooperation clause" or the "disclosure clause." And there is no evidence in this record that petitioner made the statements she did in an effort to "confront" or "forcefully withstand" a Title VII violation, rather than simply to truthfully answer the Metro internal investigator's questions. Given the statute's emphasis on actual opposition to an

unlawful employment practice, it makes no sense to contend, as petitioner and her amici do, that an employee who truthfully responds with information about allegedly inappropriate conduct when asked during an investigatory interview is automatically deemed to have engaged in protected "opposition" to the conduct.[7]

III. A RULING IN PETITIONER'S FAVOR WOULD CHILL EMPLOYER-INITIATED EFFORTS TO INVESTIGATE AND REMEDY INAPPROPRIATE CONDUCT IN THE WORKPLACE.

1. Petitioner and her amici ask this Court to extend Title VII's retaliation provision to all employees who participate in employer-initiated investigations of possible Title VII violations, including all employees who do not register opposition to any unlawful employment practice, but rather merely disclose, confirm, or refer to potentially problematic conduct during the course of an investigatory interview. That expansive interpretation of the retaliation provision would create a entirely new class of employees protected by Title VII, and in the process would hamstring employers' efforts to implement legitimate

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[7] Petitioner and the Solicitor General both point to petitioner's statement that she felt "uncomfortable" around Mr. Hughes as demonstrating her "opposition." Pet. Br. 44; Gov. Br. 10. But this statement was not made during the internal investigation; it is lifted from her later deposition answer to the question "how did you find dealing with [Mr. Hughes]" and thus has no possible bearing on whether petitioner at an earlier time engaged in protected "opposition." J.A. 16.

performance standards and to take action against employees who fail to meet those standards.

Breeden establishes that employees who rely on "mere temporal proximity" between an employer's knowledge of protected activity and an adverse employment action must show that those two events were "very close" in time in order to establish a prima facie case of retaliation. Under petitioner's interpretation, however, virtually any employee who participates in an investigative interview related to Title VII or who discloses factual information suggestive of a Title VII violation could establish a prima facie case of retaliation if he or she experienced any adverse employment action in the ensuing months. Employers therefore would face the Hobson's choice of imposing a several-month moratorium on all adverse employment actions involving any employee who participated in an internal investigatory interview—or making the significant investment of money and resources necessary to rebut the employee's prima facie case of retaliation.

Even more troubling are the implications of petitioner's position for the many retaliation claims that do *not* rest entirely on asserted temporal proximity between the employer's knowledge of protected activity and the challenged adverse employment action. A decision to demote or terminate an employee may occur many months or even years after the employer first began to address deficiencies in an employee's job performance through periodic evaluations, changes to job duties, and similarly legitimate interim measures intended to help the employee meet the employer's legitimate

standards of performance. If an employee engages in protected activity (either through participation or opposition) after the employer begins to implement such interim measures—but long before any termination decision or other adverse action—the employee may be able to use such interim measures to bridge the temporal gap between protected activity and the adverse employment action. Indeed, a period of years between protected activity and adverse action may not immunize an employer from a retaliation claim when the employee can point to other occurrences in the workplace that he or she contends are probative of retaliatory intent. *See, e.g.*, *Fabela* v. *Socorro Indep. Sch. Dist.*, 329 F.3d 409, 417 (5th Cir. 2003) (holding that a reasonable jury could find that an employee discharged 6 1/2 years after a frivolous EEOC charge was fired in retaliation for filing the charge).

The expansive interpretation advocated by petitioner thus would enable poorly performing employees, simply because of the fortuity that their employer asked them to participate in an internal investigatory interview, to forestall (or force their employer to engage in a costly defense of) an adverse employment action at the conclusion of the progressive discipline process, long after the protected activity in which they engaged. This can reasonably be expected to have a profound chilling effect on employers' willingness to implement progressive discipline policies. Employers are legitimately concerned not only with preventing unlawful retaliation in the workplace, but also with avoiding the significant costs and burdens associated with defending against fact-intensive claims that a termination decision was motivated by retaliatory

animus arising from protected activity many years earlier. Because poorly performing employees can, and frequently do, rely on temporal proximity coupled with other evidence of allegedly poor treatment to create a retaliation claim, an expansive interpretation of the retaliation provision would vastly expand the universe of employees who are effectively immune from employers' legitimate termination decisions.

2. The expansive interpretation of Title VII's retaliation provision urged by petitioner and her amici also would undermine, rather than advance, the purpose of the retaliation provision.

For example, petitioner's position, if adopted, may encourage employers to consider individual employees' job performance when deciding whom to interview in an internal investigation. The existing legal framework—including *Faragher* and *Ellerth*—encourages employers to conduct prompt, thorough investigations to prevent and correct any harassing or other discriminatory behavior. That framework does not encourage employers to consider employee job performance in the course of deciding whom to interview. But if the retaliation provision is extended to cover every employee who participates in an investigative interview, employers will have strong incentives *not* to interview employees with performance deficiencies (at least where similar information is available from other sources), lest such employees become effectively immunized from adverse employment action simply because they responded to interview questions.

The practical result of petitioner's position thus would be that employers may limit to the extent

possible the universe of employees interviewed during the course of an internal investigations. If an employer reasonably believes that two employees with different performance histories may be privy to similar information, the employer may have a strong incentive to interview only the employee with the better performance record. Employers similarly may have an incentive to review each potential interviewee's job performance and to implement any potentially warranted disciplinary action *before* interviewing the employee in order to forestall a claim that the disciplinary action was in retaliation for the employee's mere participation in the interview process. Investigative interviews should not be linked—and under the existing legal framework are *not* linked—to employee job performance in this manner. Employers should be encouraged to conduct thorough investigations of reported harassment or discrimination without fear that a retaliation claim will ensue if the employer subsequently takes adverse action against any employee who participated in the investigative process.

Retaliation lawsuits are fact-intensive and expensive; few can be resolved before summary judgment.[8] And it is sadly not uncommon for

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[8] The Chamber offers sample policies for small businesses to help them steer clear of any grey areas by adopting policies that go *beyond* ensuring minimum compliance with federal law. Petitioner and some amici reference certain sample policies on the Chamber's website that fall into this category of advice. Recognizing the time and expense of retaliation claims, the Chamber's sample policies encourage employers to adopt standards designed not only to prevent unlawful retaliation, but also

employees, recognizing that their performance is viewed as substandard, to view an internal complaint procedure as an opportunity to insulate themselves from termination. Employers will be forced to risk impairing the value of internal investigations in order to avoid giving employees with performance problems potential retaliation claims if, after an internal interview, a decision is made not to promote, or to demote or terminate, a mediocre employee. Employers' ability to act in good faith to resolve internal complaints and promote compliance with Title VII thus may be hampered by concerns over inviting expensive litigation over retaliation claims.

3. Petitioner's position also would discourage employers from initiating an investigation on their own—as Nashville did—whenever they hear water-cooler rumors about inappropriate behavior. If an employer faces serious limitations on its ability to address everything from underperforming employees to changes in market conditions necessitating layoffs without risking a long battle over a retaliation charge, employers may be less willing to take the initiative to head off improper conduct before an employee directly files a grievance over it.

4. Finally, petitioner's interpretation may well impair the efficacy of workplace investigations by curtailing the use of investigative reports. Following an investigation, employers (as Nashville did in this case) typically prepare a report summarizing the results of the investigation and enumerating any

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to limit the number of baseless retaliation (and other discrimination) lawsuits they face.

corrective measures that should be implemented. Although the manner in which such reports are used and disseminated varies by employer, employers should be encouraged to prepare such reports in their continuing efforts to eradicate discrimination and train managers and human resources professionals about appropriate workplace behavior. Petitioner's interpretation would subvert these laudable goals because it would encourage employers not to circulate investigative reports to supervisors of under-performing employees—*i.e.*, the individuals who would make decisions about those employees' advancement or continued retention. Under petitioner's proposed regime, only an employer who strictly limited dissemination of the report's contents could make business decisions about promotions, discipline, and terminations with confidence that it could rebut a claim of retaliation by establishing that the relevant decisionmakers lacked knowledge of the protected activity. *See, e.g.*, *Maarouf* v. *Walker Mfg. Co., Div. of Tenneco Auto., Inc.*, 210 F.3d 750, 755 (7th Cir. 2000) (observing that the "critical issue" was "whether the person who made the decision to terminate his employment was aware of the discrimination allegations at the time").

That result plainly is troubling; human resources professionals and managers alike should be made aware early of internal personnel problems, including those that do not rise to the level of full-fledged employment law violations. A liability scheme that has the effect of encouraging employers to withhold results of investigative reports from managers of low-performing employees is not a regime to be lightly implemented.

CONCLUSION

For the foregoing reasons, as well as those in respondent's brief, the judgment below should be affirmed.

Respectfully submitted,

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IN THE

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VICKY S. CRAWFORD,
Petitioner,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF RESPONDENT

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IN THE

Supreme Court of the United States

No. 06-1595

VICKY S. CRAWFORD,
Petitioner,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AND THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF RESPONDENT

The Equal Employment Advisory Council and the National Federation of Independent Business Small Business Legal Center respectfully submit this brief as *amici curiae*. The brief supports the position of Respondents before this Court in favor of affirmance.[1]

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes over 300 major U.S. corporations. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and practices. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The National Federation of Independent Business Small Business Legal Center, a nonprofit, public interest law firm established to be the voice for small business in the nation's courts and the legal resource for small business, is the legal arm of the National Federation of Independent Business (NFIB). NFIB is the nation's leading small business association, with offices in Washington, D.C. and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents over 300,000 member businesses nationwide. As the legal arm of NFIB, the Small Business Legal Center represents the interests of small business in the nation's courts and participates in precedent setting cases that will have a

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fund the preparation or submission of this brief. No person other than *amici curiae*, their members or their counsel made a monetary contribution to its preparation or submission.

critical impact on small businesses nationwide, such as the case before the Court in this action.

Amici's members are all employers or representatives of employers that are subject to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, and other federal and state employment nondiscrimination laws. As potential defendants to claims of discrimination under Title VII, *amici's* members have a direct and ongoing interest in the issue before this Court concerning the extent to which an employee's cooperation in an employer-initiated internal investigation may rise to the level of protected activity under Title VII. The court below correctly held that mere cooperation in an employer-initiated internal investigation, without more, does not constitute protected activity under either Section 704(a)'s "participation" or "opposition" clause.

Because of their interest in the application of the nation's fair employment laws, EEAC and/or NFIB Small Business Legal Center have filed a*micus curiae* briefs in a number of cases before this Court involving the proper interpretation of Title VII.[2] Given their significant experience, *amici* are well-situated to brief this Court on the ramifications of the

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[2] *Ledbetter v. Goodyear Tire and Rubber Co., Inc.*, __ U.S. __, 127 S. Ct. 2162 (2007) (discussing the appropriate time period for filing a discrimination claim under Title VII); *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53 (2006) (interpreting adverse action); *Pennsylvania State Police v. Suders*, 542 U.S. 129 (2004) (interpreting adverse action); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) (analyzing employer's vicarious liability); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (analyzing employer's vicarious liability); *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997) (interpreting the term "employee" under Title VII).

issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Vicky Crawford (Petitioner) was employed by the Metropolitan Government of Nashville and Davidson County, Tennessee (Metro), most recently as Payroll Coordinator within the school district's business office. Pet. App. 4a, 13a. In the fall of 2001, Metro hired Dr. Gene Hughes as the school district's Employee Relations Director. *Id.* at 4a. Shortly thereafter, Metro learned that some school district employees had raised concerns about alleged inappropriate conduct by Hughes. *Id.* A school district attorney, Jennifer Bozeman, brought the information to the attention of Dr. Pedro Garcia, the Director of Schools. *Id.* An internal investigation ensued, which involved, among other things, interviews of a number of school district employees, including Crawford. *Id.* at 5a. Veronica Frazier, Metro's Assistant Director of Human Resources, led the investigation. *Id.* at 4a-5a.

As part of her investigation, Frazier interviewed Crawford in July, 2002. *Id.* at 5a. In response to Frazier's questions, Crawford recounted inappropriate conduct of a sexual nature that Hughes allegedly had directed towards her. *Id.* Crawford never complained, either prior to or after the July 2002 interview, that Hughes had sexually harassed or otherwise discriminated against her. Pet. App. 16a-17a. A report of the investigation was completed and forwarded to Dr. Garcia in September 2002, which concluded that Hughes had engaged in inappropriate behavior, though not to the extent Crawford had alleged. Cert. Br. Opp. App. 8; Pet. App. 5a.

During the investigation, Frazier was informed of irregularities within the school district's payroll division, including failure to pay employee paycheck garnishments to the courts, failure to make employee annuity payments, and late federal tax filings. Jt. App. 92-93. A separate, independent investigation of these allegations ensued, which ultimately led to the suspension and termination of Crawford's employment on January 6, 2003. *Id.*

On June 24, 2003, Crawford filed an administrative charge of discrimination with the U.S. Equal Employment Opportunity Commission (EEOC) alleging that she was fired in retaliation for having participated in Metro's internal sexual harassment investigation. Pet. App. 6a. After receiving a no reasonable cause determination and a Notice of Right to Sue letter from the EEOC, Crawford commenced an action in the United States District Court for the Middle District of Tennessee, alleging that her termination constituted unlawful retaliation in violation of Title VII. *Id.* Metro moved for summary judgment, arguing that Crawford did not engage in protected activity under Title VII and thus could not establish a *prima facie* case of retaliation. *Id.* at 13a.

The district court agreed with Metro and granted its motion for summary judgment. *Id.* at 12a, 17a. The court analyzed Crawford's claim under both the "participation" clause and the "opposition" clause of Section 704(a) of Title VII. Pet. App. 15a-17a. The court held that Section 704(a) does not protect participation in internal employer investigations in the absence of a pending EEOC charge, and there was no pending EEOC charge at the time Frazier interviewed Crawford. *Id.* It also held that Crawford did not engage in opposition conduct merely by respond-

ing to questions during Metro's internal investigation. *Id.* at 16a-17a. The district court thus concluded that Crawford could not establish that she was terminated for engaging in protected activity in violation of Section 704(a). *Id.* at 15a-17a.

Crawford appealed the district court's decision to the Sixth Circuit, which affirmed summary judgment, holding that Crawford's conduct did not amount to either "participation" or "opposition" within the meaning of Section 704(a). Pet. App. 6a-10a. Like the district court, the Sixth Circuit found that Crawford's conduct did not amount to protected activity under the "participation" clause of Section 704(a) because there was no EEOC charge pending at the time Frazier interviewed her. *Id.* at 8a. In doing so, the Sixth Circuit relied on decisions from a number of other federal courts of appeals, all holding that participation in an internal EEO investigation absent a formal EEO charge or civil complaint is insufficient to constitute "participation" under Section 704(a). *Id.*

The Sixth Circuit also rejected Crawford's contention that her involvement in her employer's internal EEO investigation amounted to protected "opposition" conduct under Section 704(a), concluding that Crawford's conduct in cooperating with Metro's internal investigation was not the kind of overt opposition required for protection under Title VII. *Id.* at 7a-8a. It observed, "[t]he general idea is that Title VII demands active, consistent 'Opposing' activities to warrant . . . protection against retaliation." *Id.* at 7a (citation and internal quotations omitted).

Petitioner filed a petition for writ of certiorari, which this Court granted on January 18, 2008.

SUMMARY OF ARGUMENT

The Sixth Circuit properly held that mere passive cooperation in an employer-initiated internal EEO investigation does not rise to the level of protected activity under Section 704(a) of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e-3(a), which protects only those individuals who "oppose" discriminatory employment practices and those who "participate" in Title VII investigations, proceedings, or hearings.

An employer-initiated internal investigation is not an "investigation, proceeding or hearing" under Section 704(a). Title VII, 42 U.S.C. §§ 2000e *et seq.*, establishes "an integrated, multistep enforcement procedure," *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359 (1977), that begins with the filing of a charge of discrimination with the EEOC, continues with an EEOC investigation, and culminates either in the EEOC filing a complaint in federal court or issuing the charging party a Notice of Right to Sue letter. The administrative enforcement procedure established under Title VII simply does not include employer-initiated internal investigations and thus participation in an internal investigation does not constitute participation in a Title VII "proceeding."

The Sixth Circuit also was correct in holding that to be protected under § 704(a), opposition conduct requires an individual do more than merely cooperate in an employer-initiated internal investigation. Title VII calls on employers "to self-examine and to self-evaluate their employment practices . . . ." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975) (citation omitted). Thus, employers are encouraged to be pro-active in handling workplace issues. As this Court has observed, however, employees also bear some

responsibility in effectuating the purposes of Title VII. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764-65 (1998). Extending protection under Section 704(a) to those who do not come forward undermines the principle of "avoidable consequences" and makes it significantly more difficult for employers to engage in proactive prevention. *Id.*

Affirming the Sixth Circuit's decision below would serve the purposes of Title VII by maintaining a framework for protection that is broad in scope while still balancing important employer interests. Section 704(a) already extends protection to those who, in good faith, actively oppose discriminatory employment practices even in the absence of a filed charge. Further expansion thus is unnecessary and may chill proactive corporate investigations by placing employers at risk of having to defend frivolous charges and lawsuits brought by a new class of "anonymous" complainants. Furthermore, there already exists in the *Faragher/Ellerth* affirmative defense a strong incentive for employers not to retaliate against employees. As the court below observed, "[a] policy of firing any witness that testified negatively during an internal investigation would certainly constitute bad faith; even an instance of an allegedly unjustified firing would put the *Faragher* defense at risk." Pet. App. 9a-10a. The decision below thus properly maintains the balance contemplated by Title VII between protecting access to Title VII's enforcement scheme and employers' interests in conducting proactive investigations without the fear of unfounded retaliation charges and lawsuits.

ARGUMENT

I. THE SIXTH CIRCUIT PROPERLY HELD THAT MERE PASSIVE COOPERATION IN AN EMPLOYER-INITIATED INTERNAL EEO INVESTIGATION DOES NOT RISE TO THE LEVEL OF PROTECTED ACTIVITY UNDER TITLE VII'S ANTI-RETALIATION PROVISION

A. An Employer-Initiated Internal Investigation Is Not An "Investigation, Proceeding, Or Hearing" Under Title VII's Anti-Retaliation Provision

Section 704(a) of Title VII provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this [subchapter], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this [subchapter].

42 U.S.C. § 2000e-3(a). Section 704(a) thus protects those who "oppose" discriminatory employment practices, as well as those who "participate" in Title VII investigations, proceedings, or hearings. *See Moore v. City of Philadelphia*, 461 F.3d 331, 341 (3d Cir. 2006). "The two clauses of this section typically are described, respectively, as the opposition clause and the participation clause." *Gilooly v. Missouri Dep't of Health & Senior Servs.*, 421 F.3d 734, 741 (8th Cir. 2005) (Colloton, J., concurring in part, dissenting in part).

Several federal courts of appeals have had the opportunity to address whether or not informal employee complaints or participation in an employer-initiated internal investigation constitute protected activity under the participation clause of Section 704(a). In addressing this issue, these courts consistently have held that mere cooperation in an employer's internal investigation, absent a pending EEOC charge, is *not* protected "participation" conduct.[3] *EEOC v. Total Sys. Servs., Inc.*, 221 F.3d 1171, 1174 (11th Cir. 2000) (the "clause protects proceedings and activities which occur in conjunction with or after the filing of a formal charge with the EEOC"); *Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 428 (5th Cir. 2000) ("In the instant case, the 'participation clause' is irrelevant because Byers's [SIC] did not file a charge with the EEOC until *after* the alleged retaliatory discharge took place"); *Brower v. Runyon*, 178 F.3d 1002, 1006 (8th Cir. 1999) (participation includes "[a]t a minimum . . . the beginning of a proceeding or investigation under Title VII"); *Vasconcelos v. Meese*, 907 F.2d 111, 113 (9th Cir. 1990) ("Accusations made in the context of charges before the Commission are protected by statute; charges made outside of that context are made at the accuser's peril") (footnote omitted); *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1313 (6th Cir. 1989) ("since there is no evidence that [Title VII] proceedings were instigated prior to Booker's letter, he cannot seek protection under the participation

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[3] While acknowledging that the Sixth Circuit's decision "comports with decisions of other circuits to have considered the issue," the United States in its *amicus* brief dismisses this fact by suggesting the weight of authority simply is incorrect. Brief for United States as *Amicus Curiae* 24.

clause"); *Silver v. KCA, Inc.*, 586 F.2d 138 (9th Cir. 1978) (finding that an EEOC charge must be filed prior to alleged retaliatory conduct to establish plaintiff engaged in protected activity).

Requiring that an EEOC charge be pending in order for conduct to be protected under Section 704(a)'s participation clause comports with the underlying purpose of Title VII as a whole. "The purpose of the statute is to protect access to the machinery available to seek redress for civil rights violations and to protect the operation of that machinery once it has been engaged." *Brown & Williamson Tobacco Co.*, 879 F.2d at 1313. As this Court has observed,

> In the Employment Opportunity Act of 1972 Congress established an integrated, multistep enforcement procedure culminating in the EEOC's authority to bring a civil action in a federal court. That procedure begins when a charge is filed with the EEOC alleging that an employer has engaged in an unlawful employment practice.

Occidental Life, 432 U.S. at 359 (footnote omitted).

Thus, the "machinery" protected under Title VII is the "multistep enforcement procedure" established by Title VII, and, as defined, does not include—and cannot be triggered by—employer-initiated internal investigations conducted in the absence of an EEOC charge. The statute requires that an individual file a charge of discrimination with the EEOC within 180 or 300 days of the alleged discriminatory act in order to begin the administrative enforcement process. 42 U.S.C. § 2000e-5(e)(1); *Ledbetter v. Goodyear Tire and Rubber Co., Inc.*, __ U.S. __, 127 S. Ct. 2162, 2165 (2007). The EEOC then must notify the employer identified in the charge of the allegations within ten

days of the filing of the charge, and thereafter "shall make an investigation thereof" to determine if there exists reasonable cause to believe the charge is true. 42 U.S.C. § 2000e-5(b). If the EEOC determines that there is reasonable cause to believe the charge is true, it must attempt to eliminate the alleged discriminatory practice through "conference, conciliation, and persuasion." *Id.* Only after the EEOC has dismissed a charge or has issued a Notice of Right to Sue to the charging party may he or she file an action in federal court. 42 U.S.C. § 2000e-5(f)(1).

An employer-initiated internal investigation thus plainly is not a Title VII "proceeding, investigation or hearing" as contemplated by the Act. Filing an internal EEO complaint does not toll the timeframe within which a Title VII charge must be filed, nor is participation in an internal EEO investigation sufficient to satisfy a plaintiff's duty to exhaust administrative remedies.[4] *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974) (Title VII "specifies with precision the jurisdictional prerequisites that an individual must satisfy before he is entitled to institute a lawsuit. In the present case, these prerequisites were met when petitioner (1) filed timely a charge of employment discrimination with the [EEOC], and (2) received and acted upon the [EEOC]'s statutory notice of the right to sue") (citation omitted). Furthermore, Title VII's administrative enforcement mechanism does not require employer-initiated internal investigations under any

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[4] In this regard, the United States' arguments that an employer's internal investigation should be elevated to the status of an EEOC charge for the purposes of Section 704(a) is disingenuous.

circumstances; in fact, nowhere in Title VII are internal investigations even mentioned.

In contrast to an EEOC investigation, employer-initiated internal investigations generally proceed pursuant to corporate policy and can encompass issues that are well beyond the scope of Title VII—actions, for instance, that may be legal under Title VII, but which nevertheless may violate an employer's internal workplace conduct policy. During an internal investigation process, "the employer is not acting pursuant to the statute or under color of law, but is conducting the company's own business." *Total Sys. Servs., Inc.*, 221 F.3d at 1176. To equate an internal employer investigation with an EEOC investigation under the participation clause would be inconsistent with Title VII's well-established administrative enforcement scheme.

Employers should be free to proactively investigate claims of harassment without the fear that any employee who cooperates in the investigation later could file a charge for retaliation if they suffer disciplinary action, either as a result of the investigation or for some other reason close in time to the investigation. Expanding protection under the participation clause to include internal employer investigations would place an unfair burden on employer-initiated internal investigations by exposing employers to a potential flood of frivolous retaliation charges and lawsuits, which in turn could dissuade employers from proactively investigating inappropriate workplace conduct. By limiting coverage to post-charge activity, "the participation clause prevents the burden of Title VII from falling on an employer who proactively chooses to launch an internal investigation." Pet. App. 10a.

Relying on this Court's decisions in *Faragher* and *Ellerth*, Petitioner and her *amici* attempt to equate a corporate investigation conducted pursuant to corporate policy with a government-conducted EEOC investigation conducted pursuant to Title VII in order to make it "fit" within Section 704(a)'s participation clause. They suggest that the affirmative defense to liability established by this Court in those cases essentially obligates an employer to institute anti-harassment policies and procedures, and, in turn requires employees to affirmatively report incidents of alleged harassment to their employer as a prerequisite to filing an EEOC charge. Pet. Br. 27-29. Petitioner argues that an employer's internal proceeding therefore is an integral part of the Title VII framework and must be considered an investigation or proceeding under Title VII. *Id.*

Contrary to Petitioner's arguments, however, *Faragher* and *Ellerth* do not by their own accord *require* employers to develop formal anti-harassment policies or to establish specific internal complaint procedures. The decisions simply afford employers the opportunity to avoid liability resulting from unlawful harassment perpetrated by their supervisors. *See Total Sys. Servs., Inc.*, 211 F.3d at 1174 n.3.

In fact, extending protection under the participation clause to individuals who passively cooperate in internal investigations could very well undermine the *Faragher/Ellerth* affirmative defense. In this case, for instance, Petitioner, a 30-year employee presumably familiar with Metro's EEO policies and procedures, could have at any time filed a formal complaint alleging sexual harassment. She chose not to do so. If Petitioner had filed a suit for sexual harassment (as opposed to retaliation) under these

circumstances, Respondent would have been able to successfully assert the *Faragher/Ellerth* affirmative defense because it had a comprehensive anti-harassment policy in place and had instituted procedures for employees to report harassing conduct, procedures which Petitioner "unreasonably" failed to take advantage of prior to filing suit.

Allowing Petitioner to file a claim for retaliation under the participation clause permits her to bypass—for no good reason—the corrective opportunities provided for by the Respondent, thus rendering the second prong of the *Faragher/Ellerth* affirmative defense moot. While Petitioner may not have been able to directly recover for sexual harassment, under the expanded theory she endorses, she nevertheless would be able to state a viable claim for retaliation.

The Petitioner and her a*mici* would like this Court to believe that context is irrelevant when determining whether an employee has engaged in protected activity under Title VII, but context often matters in making such determinations. As this Court has observed, "[t]he significance of any given act of retaliation will often depend upon the particular circumstances. Context matters." *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 69 (2006). They argue that the mere act of conveying information about a potentially harassing incident, no matter where, when, or how it is done, should always be protected under the participation clause of Section 704(a). But the plain text of the law compels a different conclusion.

B. The Sixth Circuit Was Correct That Opposition Requires More Than Mere Cooperation In An Employer-Initiated Internal Investigation

The Sixth Circuit's conclusion that Petitioner's actions did not rise to the level of opposition under Title VII comports with other cases addressing the issue. Courts generally have only extended protection under the opposition clause to individuals who have actively or overtly opposed what they reasonably believed to be discriminatory conduct. *Valentin-Almeyda v. Municipality of Aguadilla*, 447 F.3d 85, 96-97 (1st Cir. 2006) (complaint to supervisor and EEO officer); *Moore v. City of Philadelphia*, 461 F.3d 331, 343 (3d Cir. 2006) (complaints to supervisors and those up the chain-of-command); *Worth v. Tyer*, 276 F.3d 249, 265 (7th Cir. 2001) (report to local police regarding assault); *Pastran v. K-Mart Corp.*, 210 F.3d 1201, 1203, 1205 (10th Cir. 2000) (complaint to human resources manager and district manager); *Trent v. Valley Elec. Ass'n, Inc.*, 41 F.3d 524, 525 (9th Cir. 1994) (complaint to office manager and later a written complaint); *Kotcher v. Rosa & Sullivan Appliance Ctr.*, 957 F.2d 59, 65 (2d Cir. 1992) (internal complaint to company management protesting supervisor's sexually harassing conduct); *Armstrong v. Index Journal Co.*, 647 F.2d 441, 448 (4th Cir. 1981) (complaints to supervisors regarding unequal pay); *but see Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304 (6th Cir. 1989) (holding that one letter to the human resources department was *not* opposition conduct).

In order to be considered protected activity under Section 704(a), opposition conduct must involve some affirmative or overt act. For example, in *Index*

Journal Co., 647 F.2d at 448, the Fourth Circuit held that several verbal complaints the plaintiff made to her supervisor about her rate of pay, coupled with the fact that higher-level managers also knew about the complaints, constituted protected opposition conduct. While the complaints were verbal and informal, it was clear to the court that the plaintiff was affirmatively opposing conduct she reasonably believed to be discriminatory. *Id.*

Neither Petitioner nor her *amici* can point to any cases that support the claim that Section 704(a) does not require "active" opposition. Whether conduct is protected under the opposition clause is a factual inquiry that should be made on a case-by-case basis. There is no disagreement that some active and opposing conduct, including, for example, verbal or written internal complaints to supervisors or managers, threats to file an EEO claim, picketing discriminatory conduct, or even disobeying an order that an employee believes to be discriminatory, might constitute protected activity under Section 704(a), depending on the circumstances. Petitioner engaged in no such conduct, however.

While the EEOC in written enforcement guidance[5] has taken the position that testifying or presenting evidence in an employer's internal EEO investigation always is protected under the opposition clause, at least one federal appellate court has rejected the agency's interpretation. *Clover v. Total Sys. Servs., Inc.*, 176 F.3d 1346 (11th Cir. 1999).[6] The EEOC

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[5] EEOC Compl. Man. § 2: Threshold Issues, #2-II-A-5 All Statutes: Retaliation, *available at* http://www.eeoc.gov/policy/docs/threshold.html#2-II-A-5

[6] Even the agency's guidance on retaliation, a separate document from the "threshold issues" guidance, *supra* note 5, uses

explains that Title VII encourages employers to undertake proactive investigations and, therefore, when an employer investigates allegations of discrimination, an employee's cooperation in that investigation, by definition, is opposition to the conduct that is being investigated.[7] But this reasoning draws no line between employees who simply provide information during an internal investigation and those who legitimately oppose the conduct at issue. It also fails to account for investigations of corporate misconduct rather than potential violations of Title VII. While the EEOC's policy guidance suggests that anyone who gives information during an internal EEO investigation should be found to have engaged in opposition conduct, even if some employees never intend to oppose the conduct, this cannot be what Congress intended.

Protecting every participant in an internal investigation, whether they intend to oppose discriminatory conduct or not, would lead to a significant increase in claims of retaliation, as employees facing any type of discipline or punishment could use their cooperation in an internal investigation as a shield to any subsequent personnel issues. Extending protection as Petitioner urges also would create a

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conduct that can only be described as overt and active conduct to describe what may constitute opposition: "Complaining to anyone about the alleged discrimination against oneself or others;" threatening to file a charge of discrimination; picketing in opposition to discrimination; or refusing to obey an order reasonably believed to be discriminatory. *See* EEOC Compl. Man. § 8: Retaliation, #2-B Protected Activity: Opposition, *available at* http://www.eeoc.gov/policy/docs/retal.html#IIpartB

[7] *See* EEOC Compl. Man. § 2: Threshold Issues, #2-II-A-5 All Statutes: Retaliation n.41, *available at* http://www.eeoc.gov/policy/docs/threshold.html#N_41

new class of plaintiffs—the "anonymous objector"—which essentially would require employers to become "mind readers" in order to determine who is opposing allegedly discriminatory conduct and who is not.

Internal investigations generally are conducted as confidentially as possible. Under the rule advanced by Petitioner, an employee who simply cooperates in an internal investigation and later suffers some adverse employment action could claim protected status, even though he or she never took affirmative action to voice any opposition, and regardless of whether the ultimate decision-maker had any knowledge whatsoever of the alleged protected activity. The time and expense associated with litigating an "anonymous objector" retaliation case would place unnecessary and unmanageable burdens on employers and would do nothing to advance Title VII's purposes and objectives.

Title VII certainly encourages employers to investigate allegations of workplace misconduct and to correct conduct that, if left unresolved, could lead to unlawful discriminatory employment practices. As this Court has observed, however, employees also bear some responsibility to effectuate the purposes of Title VII. *Ellerth*, 524 U.S. at 764. Title VII "borrows from tort law the avoidable consequences doctrine under which victims have a duty to use such means as are reasonable under the circumstances to avoid or minimize the damages that result from violations of the statute." *Pennsylvania State Police v. Suders*, 542 U.S. 129, 146 (2004) (citations and internal quotations omitted). Indeed, an employer may never identify potentially discriminatory conduct if employees do not report the conduct. Protecting those who do not come forward and take

advantage of the means available to oppose what they reasonably believe to be inappropriate conduct undermines the principle of avoidable consequences and makes it significantly more difficult for employers to engage in proactive prevention.

In addition, an employer will have little incentive to conduct proactive investigations if it has to worry that any employee who simply cooperates in such an investigation might later sue for retaliation. Practically speaking, even if an employer could successfully articulate a legitimate, nondiscriminatory reason for the employee's termination, defending such a retaliation charge would no doubt be time consuming and costly. Employers should not have to bear this burden in cases where an employee did nothing affirmative to voice his or her opposition to conduct believed to constitute a violation of Title VII.

II. AFFIRMING THE SIXTH CIRCUIT'S DECISION BELOW WOULD SERVE THE PURPOSES OF TITLE VII BY MAINTAINING A FRAMEWORK FOR PROTECTION THAT IS BROAD IN SCOPE WHILE STILL BALANCING IMPORTANT EMPLOYER INTERESTS

A. The Suggestion That Retaliation Against Witnesses In Employer-Initiated Internal Investigations Would Dramatically Increase Is Greatly Exaggerated And Extending Protection Under Section 704(a) May Serve To Chill Proactive Employer Investigations

Petitioner and her *amici* paint an unrealistic picture in which every complaining employee and

every witness cooperating in an employer's internal investigation is terminated on the spot without Section 704(a) protection. But this "sky is falling" scenario has not become a reality, even against the backdrop of decisions that consistently have refused to extend Section 704(a)'s scope to the point urged by them.

This Court described the primary objective of Title VII as encouraging employers "to self-examine and to self-evaluate their employment practices . . . ." *Albemarle Paper Co.*, 422 U.S. at 418 (citation omitted). In *Faragher* and *Ellerth*, this Court reinforced this concept by providing for an affirmative defense that encourages employers to develop, and individuals to use, effective complaint procedures. *Ellerth*, 524 U.S. at 764-65; *Faragher*, 524 U.S. at 806-08. Employers long ago recognized that workplace discrimination not only is against the law, but also is bad business, causing employees to be less productive, less satisfied with their jobs, and ultimately less likely to stay with the company. Most employers are interested in promoting a harmonious workplace, including instituting comprehensive policies prohibiting workplace harassment and retaliation that often goes beyond what is required by Title VII.[8]

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[8] The Petitioner and her *amici* cite EEAC briefs out of context in arguing for an expansion of § 704(a). *Amici's* position is and has always been that employees should feel free to report potentially discriminatory conduct to their employers without the fear of retaliation and that employers should do everything they can to make employees feel comfortable doing so. The point made here is that it is unreasonable to hold employers accountable for retaliation based on actions that are not protected under the text of the statute and of which they would have no notice.

In determining what conduct should be protected under the opposition clause, however, courts should "balance the purpose of the Act to protect persons engaging reasonably in activities opposing . . . discrimination, against Congress' equally manifest desire not to tie the hands of employers in the objective selection and control of personnel." *Glover v. South Carolina Law Enforcement Div.*, 170 F.3d 411, 413 (4th Cir. 1999) (citation omitted).

Subjecting employers to the predictable flood of frivolous retaliation charges and lawsuits that would result from an expansion of Section 704(a) would frustrate their efforts to proactively address workplace issues and would impose an unmanageable burden on both the EEOC and the courts.

B. Extending Protection Based On The Facts Of This Case Is Unnecessary Because Broad Protection Already Exists Under Section 704(a)

There already exists under Section 704(a) broad protection for those employees who choose to act against what they perceive to be unlawful discrimination. Anyone who files a charge of discrimination with the EEOC is protected under the participation clause, and anyone who actively opposes conduct he or she reasonably believes to be discriminatory is protected under the opposition clause. There simply is no sound basis for judicially expanding Section 704(a) any further.

The prospect that any employee cooperating in an employer-initiated internal investigation may file a claim for retaliation under Section 704(a) presents employers with a difficult choice. Generally it is in an employer's best interest to proactively investigate

rumors of inappropriate workplace conduct. But when faced with the fact that being proactive might lead to potential litigation for retaliation, some employers will decide not to take that risk when seemingly minor workplace issues arise. Employers should not be forced to make this choice.

Petitioner argues that employers need some incentive in order not to retaliate against employees who cooperate in internal investigations, but there already is a strong incentive preventing employers from retaliating against employees in these circumstances. First, responsible employers are not looking for the opportunity to retaliate against their employees. But even in situations in which there may be the threat or opportunity for retaliation, the availability of the *Faragher/Ellerth* affirmative defense provides a strong incentive against retaliating. As the court below observed, "[a] policy of firing any witness that testified negatively during an internal investigation would certainly constitute bad faith; even an instance of an allegedly unjustified firing would put the *Faragher* defense at risk." Pet. App. 9a-10a. This alone acts as a strong deterrent to indiscriminately terminating any employee who cooperates in an internal investigation.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

VICKY S. CRAWFORD,

Petitioner,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE* LEADERSHIP CONFERENCE ON CIVIL RIGHTS AND LEADERSHIP CONFERENCE ON CIVIL RIGHTS EDUCATION FUND IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

The Leadership Conference on Civil Rights (LCCR) is a coalition of more than 200 national organizations committed to the protection of civil and human rights in the United States.[1] Founded in 1950 by three legendary leaders of the civil rights movement—A. Philip Randolph, of the Brotherhood of Sleeping Car Porters; Roy Wilkins, of the NAACP; and Arnold Aronson, of the National Jewish Community Relations Advisory Council—LCCR is the nation's oldest, largest, and most diverse civil and human rights coalition. Its member organizations represent men and women of all races and ethnicities.[2]

Among LCCR's members are organizations, including, *inter alia*, the American Civil Liberties Union, AFL-CIO, Anti-Defamation League, Asian American Justice Center, Lawyers' Committee for Civil Rights Under Law, Legal Momentum, Mexican American Legal Defense and Educational Fund, NAACP, NAACP Legal Defense and Educational Fund, Inc., National Partnership for Women & Families, National Women's Law Center, and Women Employed, that have been at the forefront of advocacy before the courts to ensure equal

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amici certify that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than amici, their members, and their counsel has made a monetary contribution to the preparation and submission of this brief. Letters from the parties consenting to the filing of this brief are on file with the clerk.

[2] The appendix to this brief contains a complete list of LCCR member organizations.

employment opportunity for men and women from diverse communities, and to secure essential protections against workplace discrimination.

LCCR promotes effective civil rights legislation and policy as well as the strong enforcement of existing statutory and constitutional protections. Its members are dedicated to preserving the interests of individuals in raising issues of unlawful discrimination and the interest of society in having those issues brought to light. It is extremely important to LCCR that those who protest discrimination, in all of its forms, be protected against retaliation. LCCR has consistently been involved in efforts to secure these protections before Congress and in the Courts. Most recently, LCCR filed amicus briefs on this issue in *Jackson v. Birmingham Board of Education*, and *CBOCS West, Inc. v. Humphries*.

The Leadership Conference on Civil Rights Education Fund (LCCREF) is the research, education, and communications arm of LCCR. It focuses on documenting discrimination in American society, monitoring efforts to enforce civil rights legislation, and fostering better public understanding of issues of prejudice.

LCCR and LCCREF strongly support Petitioner's position that Title VII's anti-retaliation provision affords protection from retaliation for employees who participate in internal investigations. Based on their long experience in supporting and monitoring the enforcement of federal antidiscrimination mandates, amici strongly believes that protection against retaliation for employees who participate in internal investigations is

indispensable to the efficient, effective enforcement of Title VII and of federal anti-discrimination laws generally.

SUMMARY OF ARGUMENT

This case presents a straightforward question: Can an employee be fired for reporting workplace discrimination to her employer during an internal investigation? The answer is no. An employee's involvement in an internal investigation is protected under the plain language of Title VII of the Civil Rights Act of 1964.

It is well-accepted by the Court that Congress intended Title VII to function as a preventive measure, giving employers incentives to help detect and eradicate discriminatory behavior. The cooperation of victims and witnesses of discrimination is crucial to the effective enforcement of Title VII. Thus, Title VII's anti-retaliation provision, which offers broad protection to employees who oppose discriminatory behavior and who cooperate in investigations of Title VII violations, is critical to achieving the fundamental goals of Title VII.

The business community has consistently argued to the Court that employee cooperation in internal investigations is critical to their efficacy and has repeatedly recognized the importance of protecting cooperating employees against retaliation. Accordingly, business groups encourage companies to adopt policies and practices that safeguard employees who report workplace discrimination. Nonetheless, as the present case demonstrates,

without legal protections, cooperating employees will remain vulnerable.

This Court should reverse the Sixth Circuit's opinion, which has no basis in the language of the statute and runs contrary to this Court's precedent. The Court should acknowledge what the business community itself has recognized and what the plain language of the statute dictates, and clarify that Title VII provides legal protections to employees who cooperate in internal investigations.

ARGUMENT

I. THE PLAIN LANGUAGE OF TITLE VII'S ANTI-RETALIATION PROVISION PROTECTS EMPLOYEES WHO TESTIFY IN INTERNAL INVESTIGATIONS OF POTENTIAL VIOLATIONS OF TITLE VII.

Title VII of the Civil Rights Act of 1964 provides two sources of protection for victims of retaliation by employers. Title VII makes it "an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter" (the "Opposition Clause") or "because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter" (the "Participation Clause"). 42 U.S.C. § 2000e-3(a) (2006). Both clauses protect employees

who testify about workplace discrimination in internal investigations.[3]

A. Testifying About Sexual Harassment in an Internal Investigation Constitutes "Oppos[ing] . . . an Unlawful Employment Practice" for Purposes of the Opposition Clause.

The Opposition Clause protects employees who "oppose" employment practices that violate Title VII. 42 U.S.C. § 2000e-3(a) (2006). As this Court has previously recognized, an exercise in statutory interpretation ends if the language is plain and unambiguous. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). The clarity of the language is "determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* at 341.

Here, the language and context are self-explanatory. The word "oppose" literally means "to offer resistance to." *Webster's Third New International Dictionary* 1583 (2002). In the context of Title VII, this language encompasses any act or refusal to act that expresses opposition or resistance to a perceived Title VII violation.

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[3] Although the Participation Clause protects those who testify in internal investigations, it does not render the Opposition Clause meaningless. *Cf. EEOC v. Total Sys. Servs.*, 221 F.3d 1171, 1174 (11th Cir. 2000). While some conduct, such as that at issue here, falls under the rubric of both clauses, complaints that are made to an employer that do not relate to any "investigation, proceeding, or hearing" will only be protected by the Opposition Clause.

The record in this case is clear: During the course of an internal investigation designed to ferret out discriminatory behavior, Petitioner gave detailed testimony accusing her supervisor of conduct that constitutes blatant sexual harassment. By doing so, Petitioner clearly expressed her disapproval and her desire for such behavior to stop. She complained about the conduct and, at least theoretically, helped her employer address and eliminate discriminatory behavior from her workplace. Simply put, she acted to *oppose* her supervisor's actions within the plain meaning of the word. Accordingly, Petitioner's actions are explicitly protected by the statute.[4]

By requiring "overt opposition" and "active, consistent opposing activities" in order to qualify for protection from retaliation, the Sixth Circuit erroneously imposed additional requirements that have no basis in the language of the statute. *See Crawford v. Metro. Gov't of Nashville & Davidson County*, 211 F. App'x 373, 376 (6th Cir. 2006).[5] The

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[4] This interpretation is in line with numerous other circuit court decisions. *See, e.g.*, *McDonnell v. Cisneros*, 84 F.3d 256, 262 (7th Cir. 1996) ("Several courts, including our own, hold that assisting another employee with his . . . discrimination claim, as well as other endeavors to obtain the employer's compliance with Title VII, is protected 'opposition conduct.'"); *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 580 (6th Cir. 2000) ("[T]he *only* qualification that is placed upon an employee's invocation of protection from retaliation under Title VII's [O]pposition [C]lause is that the manner of his opposition must be reasonable." (emphasis added)).

[5] The Sixth Circuit's requirement of "consistent" opposition seems particularly inappropriate in light of Title VII's goals of promoting conciliation between employers and employees. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998)

Sixth Circuit's opinion also reasoned that Petitioner did not "instigate[] or initiate[] any complaint prior to her participation in the investigation, nor did she take any further action following the investigation." *Id.* These facts are irrelevant: The statutory touchstone is *opposition*, not initiation, and the fact that Petitioner did not initiate the complaint or follow up after the investigation has absolutely no bearing on whether her testimony was given *against* her supervisor's conduct. There are also no requirements in the statute as to how proactively or tenaciously an employee must oppose a Title VII violation for his or her actions to be protected.[6]

In the present case, Petitioner's testimony was made directly to her employer in a context that objectively indicates that she opposed the supervisor's behavior. Thus, Petitioner's testimony is protected activity under the plain language of the Opposition Clause.

B. An Internal Investigation of a Potential Title VII Violation Is an "Investigation, Proceeding, or Hearing Under" Title VII for Purposes of the Participation Clause.

The Participation Clause pertains to any "investigation, proceeding or hearing *under this subchapter*." 42 U.S.C. § 2000e-3(a) (2006) (emphasis added). As the Petitioner and the

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(noting "Congress' intention to promote conciliation rather than litigation in the Title VII context").

[6] The only requirement for opposition to be protected is that the manner in which it is expressed be "reasonable." *See Johnson*, 215 F.3d at 580. There is no dispute that Petitioner's conduct here was reasonable.

Solicitor General have persuasively argued,[7] Congress's use of this expansive language, as compared to the more limiting language that it used in other provisions of the statute that only apply to official EEOC proceedings or investigations, indicates that Congress intended the Participation Clause to offer broad protection that would include all investigations undertaken in connection with a potential Title VII violation.[8]

This logic has been further strengthened by the Court's decisions in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). These decisions reshaped the legal landscape of Title VII, making employers' internal policies and practices for investigating and addressing complaints of discrimination an integral part of Title VII compliance. These cases handed employees a sword by establishing that "[a]n employer is subject to

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[7] Pet. Br. at 13-19; Brief for the United States as Amicus Curiae in Support of Petitioner's Petition for Certiorari at 10-15, *Crawford v. Metro. Gov't of Nashville & Davidson County*, No. 06-1595 (Dec. 18, 2007).

[8] Indeed, even as the Participation Clause has been interpreted by the Sixth Circuit, protection is not limited to formal investigations, proceedings or hearings conducted *by* the EEOC. Instead, internal investigations are protected if they are conducted after a complaint has been filed with the EEOC. *See Abbott v. Crown Motor Co.*, 348 F.3d 537, 543 (6th Cir. 2004). Whether an internal investigation is instigated preventively or in response to a filed EEOC complaint, it is not an official proceeding and has no formal connection to the EEOC. Therefore, the filing of an EEOC complaint should not affect whether an internal investigation is made "under" Title VII. There is nothing in the statutory language that supports such a chronological distinction.

vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with . . . authority over the employee." *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. At the same time, however, these cases provided employers with a powerful shield in the form of an affirmative defense; an employer can insulate itself against vicarious liability by demonstrating (1) that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior" and (2) that "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

Neither case explicitly requires employers to implement an internal complaint processing and investigation procedure. Both clearly indicate, however, that the Court expected internal investigations to occupy a central role under Title VII. Under the holdings, "the need for a stated policy suitable to the employment circumstances may appropriately be addressed . . . when litigating the first element of the defense." *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. *Faragher* goes further, strongly suggesting that large employers will not be able to establish the first element of the affirmative defense unless they promulgate formal anti-harassment policies and well-designed complaint procedures.[9] Both cases also state that

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[9] *Faragher*, 524 U.S. at 808-09 ("Unlike the employer of a small work force, who might expect that sufficient care to prevent tortious behavior could be exercised informally, those responsible for city operations could not reasonably have

demonstrating an employee's unreasonable failure to use an employer's complaint procedure "will normally suffice to satisfy the employer's burden under the second element of the offense." *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 808.

Viewed in combination, these holdings establish that an employer may only avoid "automatic" vicarious liability, *see Faragher*, 524 U.S. at 804; *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986), if it can prove that it acted reasonably to prevent and correct harassment *and* that the employee unreasonably failed to utilize any corrective mechanisms that the employer provided. Therefore, it is difficult, if not impossible, for large employers (such as city governments) to avoid vicarious liability if they do not establish formal internal procedures, and an employee who unreasonably fails to take advantage of an employer's reasonable internal complaint procedure will not be able to recover against the employer.

This system of incentives inextricably binds employers' formal internal investigations to the operation of Title VII. With the possible exception of small employers, liability under Title VII can turn on the existence and implementation of reasonable processes for handling complaints internally. Employees are compelled to participate in these internal proceedings because their right to recover under Title VII is generally contingent on such participation. This incentive structure also ensures

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thought that precautions against hostile environments in any one of many departments in far-flung locations could be effective without communicating some formal policy against harassment, with a sensible complaint procedure.").

that Title VII cases generally will only be brought against employers after the employers' internal grievance procedures have run their course. Thus, the reasonableness of the structure and administration of a company's internal processes can be a central issue in Title VII litigation.

Thus, under *Faragher* and *Ellerth*, the presence or absence of an appropriate internal investigation process and the details of its design and administration can determine whether a company is liable for discrimination under Title VII. These internal investigations are clearly contemplated by Title VII and are integral to its operation. Accordingly, such proceedings are investigations, proceedings or hearings "under" Title VII within the meaning of the statute. 42 U.S.C. § 2000e-3(a) (2006).[10]

Employers have overwhelmingly responded to the legal framework set forth in *Faragher* and *Ellerth* by establishing internal procedures for reporting and investigating complaints of harassment.[11] Thus, internal complaint procedures

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[10] The Court's subsequent decisions further bolster this conclusion. In *Kolstad*, the Court held that a plaintiff under Title VII cannot recover punitive damages against an employer who engages in good faith efforts to comply with Title VII (presumably by establishing reasonable internal complaint, investigation, and remediation processes) on the basis of the actions of the employer's managerial agents. *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 545 (1999). The Court has also noted that fostering effective employer grievance procedures advances Congress's purpose of amicably resolving Title VII controversies. *Pa. State Police v. Suders*, 542 U.S. 129, 145 (2004).

[11] See discussion in Part III.B, *infra*.

and investigations play as significant a role in the resolution of complaints under Title VII *in practice* as they do under Title VII's formal legal framework. In light of their prominent role in both the theoretical framework of Title VII and the practical application of its provisions, internal investigations are properly characterized as investigations under Title VII and, therefore, logically fall into the domain of the Participation Clause.

II. CONSTRUING TITLE VII'S ANTI-RETALIATION PROVISION TO PROTECT EMPLOYEES' INVOLVEMENT IN INTERNAL INVESTIGATIONS FURTHERS TITLE VII'S PURPOSE AND IS CONSISTENT WITH THE COURT'S PRECEDENT.

A. A Primary Purpose of Title VII Is to Encourage Employers to Learn of Unlawful Behavior and Take Corrective Action.

Although Title VII was intended, in part, to make victims of discrimination whole, its primary purpose was to prevent and eradicate discrimination in the workplace.[12] Congress determined that the

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[12] *See, e.g.*, *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998) (acknowledging that Title VII's primary aim is "not to provide redress but to avoid harm"); *Burlington N. & Santa Fe Ry. v. White*, 126 S. Ct. 2405, 2412 (2006) ("The anti-discrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status."); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975) (stating that Title VII's "central statutory purposes [are to] eradicate[e] discrimination throughout the economy and mak[e] persons whole for injuries

best and most effective way to accomplish this was for employers to develop their own internal processes to prevent and correct discrimination; Title VII was created in the hope that it would prompt employers to engage in voluntary efforts to eradicate workplace discrimination.[13]

The Court has repeatedly recognized that direct, "smoking gun" evidence of discrimination can be very difficult to uncover.[14] Claims of unlawful

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suffered through past discrimination"); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973) (finding that the purpose of Title VII is "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens").

[13] *See McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 358 (1995) ("Congress designed the remedial measures in these statutes to serve as a 'spur or catalyst' to cause employers 'to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges' of discrimination." (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975))); *EEOC v. Shell Oil Co.*, 466 U.S. 54, 77 (1984) ("[W]hen it originally enacted Title VII, Congress hoped to encourage employers to comply voluntarily with the act."); *United Steelworkers v. Weber*, 443 U.S. 193, 204-06 (1979) ("'There is reason to believe . . . that national leadership provided by the enactment of Federal legislation . . . will create an atmosphere conducive to voluntary or local resolution of . . . discrimination.'" (emphasis omitted) (quoting H.R. Rep. No. 914, 88th Cong., 1st Sess., pt. 1, p. 18 (1963))).

[14] *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 271 (1989) (O'Connor, J., concurring) ("As should be apparent, the entire purpose of the *McDonnell Douglas* prima facie case is to compensate for the fact that direct evidence of intentional discrimination is hard to come by."); *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 75 (1986) (Marshall, J., concurring) (recognizing that "discrimination is rarely carried out pursuant to a formal vote of a corporation's board of directors"); *U.S.*

discrimination often come down to one person's word against another's, which means that corroborating evidence from witnesses or other victims is vitally important to an employer seeking to determine the merit of a complaint. Thus, "Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses" when discrimination occurs. *Burlington N. & Santa Fe Ry.*, 126 S. Ct. at 2414. Title VII's anti-retaliation provisions exist to safeguard employees "by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees." *Id.* at 2412.

Without witnesses' cooperation, employers will have difficulty conducting internal investigations, accurately evaluating their employment practices, and eliminating discrimination from the workplace. Indeed, this would render internal investigations hollow exercises.[15] Moreover, if victims fear that witnesses will be unwilling to provide corroborating evidence, they will be less likely to come forward and make complaints, further hampering an employer's ability to ferret out unlawful workplace

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Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983) ("All courts have recognized that the question facing triers of fact in discrimination cases is both sensitive and difficult . . . There will seldom be 'eyewitness' testimony as to the employer's mental processes.").

[15] Under the Sixth Circuit's standard, employees who are asked to participate in their employer's internal investigation will be understandably hesitant and may even refuse to cooperate for fear that they may be fired or otherwise retaliated against. The Sixth Circuit's decision thus undermines the very purpose for which Congress enacted Title VII.

discrimination.[16] Simply put, employers' anti-discrimination policies and procedures for investigating claims of discrimination would be meaningless if employees who participated in them were subject to retaliation.

Thus, the purpose of Title VII's anti-retaliation provision "reinforces what language already indicates"—the provision applies to employees who provide incriminating testimony in internal investigations in order to "help[] assure the cooperation upon which accomplishment of the Act's primary objective depends." *Burlington N. & Santa Fe Ry.*, 126 S. Ct. at 2412, 2414.

B. This Court Has Consistently Interpreted the Anti-Retaliation and Other Provisions of Title VII Broadly to Further the Statute's Purposes.

To effectuate Congress's vision of Title VII, the Court has consistently interpreted it as providing employers with incentives to create internal policies that assist them in detecting and deterring workplace discrimination. For example, in *Faragher* and *Ellerth*, it looked to the statute's purpose to conclude that Title VII provides an affirmative defense to employers who make significant and good faith efforts to comply with Title VII.[17] In *Kolstad*,

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[16] *See* Brief for the National Women's Law Center et al. Supporting Petitioner, *Crawford v. Metro. Gov't of Nashville & Davidson County*, No. 06-1595 (Apr. 16, 2008).

[17] *See Ellerth*, 524 U.S. at 764 ("Title VII is designed to encourage the [employer's] creation of antiharassment policies and effective grievance mechanisms."); *Faragher*, 524 U.S. at 806 ("It would therefore implement clear statutory policy and complement the Government's Title VII enforcement efforts to

the Court reinforced employers' incentives to self-police by holding that employers who engage in good faith efforts to comply with Title VII are not subject to punitive damages. *Kolstad* v. *Am. Dental Ass'n*, 527 U.S. 526, 546 (1999) (acknowledging "Title VII's objective of motivat[ing] employers to detect and deter Title VII violations").

This Court has also consistently construed Title VII's anti-retaliation provision broadly to comport with Congress's intent. For example, in *Robinson*, the Court held that Title VII's anti-retaliation provision protects former employees from retaliation, even though the language of the statute refers only to "employees." *See* 519 U.S. at 346. The Court's inclusive reading of the statute was supported by the well-established purposes of Title VII. *See id.* ("Those arguments carry persuasive force given their coherence and their consistency with a primary purpose of antiretaliation provisions . . . . The EEOC quite persuasively maintains that it would be destructive of this purpose of the antiretaliation provision for an employer to be able to retaliate with impunity against an entire class of acts under Title VII . . . .").

Similarly, in *Burlington Northern*, the Court ruled that Title VII's anti-retaliation provision prohibits retaliation that takes place outside of the workplace, thereby extending the reach of Title VII's anti-retaliation provision to prohibit conduct outside the scope of the statute's substantive anti-discrimination provisions. 126 S. Ct. at 2414.

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recognize the employer's affirmative obligation to prevent violations and give credit here to employers who make reasonable efforts to discharge their duty.").

Again, the Court extended broad protection in light of the objectives of Title VII. *See id.* at 2412 ("[A] limited construction would fail to fully achieve the anti-retaliation provision's 'primary purpose' . . . .").[18]

This Court's jurisprudence compels an interpretation of Title VII that complies with the statute's expansive goals.[19] A decision confirming that Title VII protects cooperating employees from retaliation, even in the absence of a pending EEOC charge, is not only consistent with the statute's text, but is also essential to ensure the efficacy of internal complaint procedures and, therefore, to the preventive goals of Title VII.

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[18] Circuit courts have generally taken an equally expansive approach to interpreting Title VII. *See, e.g.*, *Glover v. S.C. Law Enforcement Div.*, 170 F.3d 411, 414 (4th Cir. 1999) (holding that a reasonableness test for protection of testimony under the Participation Clause would contradict the text of the statute and the objectives of Title VII); *EEOC v. Ohio Edison Co.*, 7 F.3d 541, 545 (6th Cir. 1993) (holding that opposition by a representative of a plaintiff can qualify as protected activity under the anti-retaliation provision); *Evans v. City of Houston*, 246 F.3d 344, 353 n.7 (5th Cir. 2001) (stating that internal grievance hearing regarding discrimination claims was protected activity under the Participation Clause).

[19] *See Kolstad*, 527 U.S. at 545 ("[W]e are compelled to . . . avoid undermining the objectives underlying Title VII.").

III. PROTECTING EMPLOYEES WHO TESTIFY ABOUT DISCRIMINATION IN INTERNAL PROCEEDINGS WILL NOT BURDEN EMPLOYERS BECAUSE THE BUSINESS COMMUNITY ALREADY ADVOCATES PROVIDING SUCH PROTECTIONS.[20]

A. The Business Community Has Repeatedly Touted the Importance of Witness Cooperation to the Efficacy of Internal Investigations.

The Business Community has consistently stressed to the Court the importance of meaningful internal investigations to fulfilling Title VII's preventive purpose, and has urged the Court to

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[20] The term "Business Community" is used in this Part to describe organizations that purport to represent the business community, including, but not limited to: (1) the Chamber of Commerce, which "represents the interests of over 160,000 corporations, partnerships, and proprietorships as well as several thousand state and local chambers and professional associations"; (2) the Equal Employment Advisory Council, whose membership "includes over 330 of the nation's largest private sector corporations which collectively employ more than 20 million people throughout the United States"; and (3) the Society of Human Resource Management, which "provides education and information services, conferences and seminars, government and media representation, online services and publications to more than 175,000 professional and student members worldwide." *See* Brief for the Chamber of Commerce as Amicus Curiae Supporting Respondent at ii, *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526 (1999) (No. 98-208); Brief for the Equal Employment Advisory Council as Amicus Curiae Supporting Petitioner at 2, *Pa. State Police v. Suders*, 542 U.S. 129 (2004) (No. 03-95); Brief for the Society of Human Resource Management as Amicus Curiae Supporting Petitioner at 2, *Pa. State Police v. Suders*, 542 U.S. 129 (2004) (No. 03-95).

adopt legal rules that encourage victim and witness cooperation. Employers argue that they must rely on employees to report unlawful behavior because "[e]ven the most conscientious employer cannot know or control every day-to-day action of every employee and must know of the harassing behavior before it can take action to halt it."[21]

Since the efficacy of employers' internal complaint procedures depends on the willingness of employees to report discrimination and harassment and serve as witnesses in internal investigations, the Business Community has consistently emphasized the necessity of encouraging victims and witnesses to come forward. According to the Chamber of Commerce, a "reasonable employer" will "encourage employees to report sexual harassment."[22] The EEAC agrees that "a good procedure encourages employees to report incidents of harassment . . . . Without the victim's cooperation, even the finest anti-harassment procedure is ineffective."[23] Employers also recognize that facilitating other employees' participation in internal investigations is essential. According to the Business Community, in the wake of *Faragher* and *Ellerth*, "companies have implemented formal antiharassment procedures that

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[21] Brief Amicus Curiae of the Equal Employment Advisory Council in Support of Petitioner at 23, *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) (No. 97-569).

[22] *See* Brief Amicus Curiae of the Chamber of Commerce of the United States of America in Support of Petitioner at 25, *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) (No. 97-569).

[23] Brief Amicus Curiae of the Equal Employment Advisory Council in Support of Petitioner at 23, *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) (No. 97-569).

encourage witnesses as well as victims to report sexual harassment to management."[24]

As the Business Community has acknowledged, however, "it often is difficult to persuade employees to come forward with reports of suspected wrongdoing or participate in investigations of workplace misconduct."[25] The Business Community has emphasized that affording protection to victims and cooperating witnesses is essential to encouraging their participation, and has warned of the negative consequences that will ensue if witnesses and victims are not protected: "If already reluctant employees knew that by reporting alleged wrongdoing they would potentially be exposing themselves to an investigation into their own motives, they would be even less likely to step forward."[26] But perhaps the Business Community most clearly articulated the consequences of leaving cooperating employees vulnerable to retaliation when it warned that:

> As a practical matter, a rule that effectively discourages individuals from reporting suspected wrongdoing would result in employers learning about far fewer problems at work, and thus having less of an opportunity to correct those problems and prevent future

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[24] Brief Amicus Curiae of the Equal Employment Advisory Council in Support of Petitioner at 20, *Pa. State Police v. Suders*, 542 U.S. 129 (2004) (No. 03-95).

[25] Brief for the Equal Employment Advisory Council as Amicus Curiae at 16, *BCI Coca-Cola Bottling Co. of L.A. v. EEOC*, No. 06-341 (Feb. 20, 2007).

[26] *Id.*

> occurrences. Not only would such a result be at odds with the aims and objectives of Title VII, it would lead ultimately to less productive and emotionally healthy workplaces.[27]

As the Business Community has observed, "[t]his Court has determined that 'dissuading employers from implementing programs or policies [that] prevent discrimination in the workplace is directly contrary to the purposes underlying Title VII.'"[28] Reading Title VII as exposing employees to reprisals for their cooperation with internal investigations would do precisely that: It would discourage employees from coming forward to report Title VII violations and render worthless the very internal complaint procedures adopted to uncover and address workplace discrimination. The Court should heed the warnings of the Business Community and confirm that Title VII prohibits retaliation against employees who participate in internal investigations.

B. The Business Community Already Advises Employers to Adopt Policies Prohibiting Retaliation Against Employees Who Cooperate in Internal Investigations.

The Business Community, through its publications and sample policies, already advises

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[27] *Id.* at 16-18.

[28] Brief Amicus Curiae of the Society of Human Resource Management in Support of the Petitioner at 22, *Pa. State Police v. Suders*, 542 U.S. 129 (2004) (No. 03-95) (quoting *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 545 (1999)).

employers to protect victims and witnesses from retaliation based on their cooperation with internal investigations. Notably, the Business Community has not made any distinction between investigations conducted before charges have been filed with the EEOC and those that take place afterward. Instead, it has counseled employers to prohibit retaliation against cooperating employees in *all* investigations, not only in those that are conducted after EEOC charges have been filed.

For example, a sample sexual harassment policy available on the Chamber of Commerce website includes a provision entitled "Retaliation Prohibited," which states that the employer "will permit no employment-based retaliation against anyone who brings a complaint of sexual harassment or speaks as a witness in the investigation of a complaint of sexual harassment."[29] The Chamber also acknowledges that "[w]hen an employee actually gets the nerve to report harassment, they are usually already apprehensive and scared because of the hostile treatment they may have received."[30] As a result, the Chamber recommends that employers "include a clause indicating that employees will not be penalized or reprimanded for reporting harassment."[31] According to the Chamber, incorporating such provisions into an anti-harassment policy will not only help employees, but

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[29] Sexual Harassment Aids: Sample Sexual Harassment Policy #2, http://www.uschamber.com/sb/business/tools/sxhrst_m.asp (last visited Apr. 3, 2008) (emphasis added).

[30] Creating a Harassment Policy, http://www.uschamber.com/sb/business/P05/P05_5185.asp (last visited Apr. 3, 2008).

[31] *Id.*

"may actually get them to report harassment before it gets worse or more dangerous."[32] Once an investigation has begun, the Chamber's Harassment Investigation Guide recommends that employers "[a]ssure all witnesses that their cooperation is important, that their testimony is confidential *and that they will not be retaliated against for testifying*."[33]

Similarly, business publications already advise employers that victims and witnesses who cooperate with internal investigations must be protected from retaliation. *See, e.g.*, Daryll J. Neuser, *How to Conduct Effective Internal Investigations of Workplace Matters*, Emp. Rel. L.J., Summer 2005, at 82 ("Reassure the witness that the company prohibits retaliation for participating in an internal investigation."); Jonathan A. Segal, *HR as Judge, Jury, Prosecutor and Defender*, HR Mag., Oct. 2001, at 6 ("Employees generally cannot be retaliated against for making a complaint in good faith or for serving as a witness in good faith—even if the complaint lacks merit."); Amy Maingault et al., *Insubordination, Adoption Leave, Confidentiality*, HR Mag., Apr. 2007, at 2 (explaining that witnesses "should be assured that adverse employment actions will not result from their cooperation").

Thus, the Business Community has made clear that a sound discrimination policy will protect all employees who cooperate with an internal investigation from retaliation, regardless of the

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[32] *Id.*

[33] Sexual Harassment Aids: Harassment Investigation Guide, http://www.uschamber.com/sb/business/tools/sxhrst_m.asp (last visited Apr. 3, 2008) (emphasis added).

context in which the investigation is undertaken. Establishing that such protections are legally mandated therefore presents little risk of imposing a burden on employers.

C. Clarification of the Legal Standard Is Necessary to Protect Employees and Avoid Overwhelming the Courts.

The Business Community asserts that its concerted efforts to promote formal anti-discrimination policies and complaint procedures have borne fruit.[34] The significant growth in employers' use of anti-discrimination training, policies and procedures (including internal investigation processes) certainly suggests that the Court's rulings construing Title VII have spurred some of the self-assessment and detection that Congress intended.

Yet the proliferation of internal policies against retaliation does not mean that employees do not need legal protections against retaliation. An employer's general policy against retaliation does not prevent the employer from making exceptions to the

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[34] *See, e.g.*, Brief for the Equal Employment Advisory Council as Amicus Curiae Supporting Petitioner at 3, *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) (No. 97-569) ("EEAC's members have implemented formal anti-harassment procedures that encourage witnesses as well as victims to report sexual harassment to management."); Brief of the Society of Human Resource Management and the National Federation of Independent Business Legal Foundation as Amici Curiae in Support of the Petitioner at 2-3, *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405 (2006) (No. 05-259) (stating that both organizations provide suggested procedures and other guidance to their over 800,000 combined members for redressing discrimination and retaliation).

rule when it is in the employer's interest. Indeed, the record indicates that this is precisely what happened here: Petitioner and the other women who reported sexually harassing conduct expressed their reluctance to participate in the internal investigation for fear of retaliation. Pet. Br. at 4. In response, at least one of the women was assured by the investigators that she would not be fired for her participation. *Id.* at 4. Despite this assurance, she was fired within minutes of receiving the investigation's completed report, as were the other women who participated. *Id.* at 4-5. The Business Community's articulations of best practices do not create legal protections for employees and therefore offer little solace to employees who fear retaliation. Without a decision confirming that Title VII mandates such protections, employees will remain vulnerable to reprisals.

Moreover, a decision holding that Title VII does *not* protect cooperating employees absent a pending EEOC charge would place a significant burden on employers, the EEOC, and the courts. In order to safeguard employees from retaliation, prudent counsel would advise all employees to file an EEOC charge before cooperating with any internal investigation. As a result, employers' internal investigations would stall or be rendered ineffective, and the EEOC would be inundated with charges. Employers would be forced to evaluate these charges, and courts would ultimately be left to sort out the mess. Thus, such a ruling would not only run counter to Title VII's text and purpose, but would also undermine *Faragher* and *Ellerth* by making voluntary compliance with Title VII increasingly complicated and costly.

The Court should not impose this burden on employees, employers, the EEOC, or the courts. Instead, the Court should heed the previous statements of the Business Community and confirm that Title VII's anti-retaliation provision protects employees who cooperate with internal investigations.

CONCLUSION

For the foregoing reasons, this Court should rule that Title VII prohibits retaliation against employees who provide information in an employer's internal investigation that occurs prior to the filing of an EEOC charge. The judgment of the Court of Appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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APPENDIX

LEADERSHIP CONFERENCE ON CIVIL RIGHTS (LCCR) PARTICIPATING ORGANIZATIONS, 2007-2008

A. Philip Randolph Institute
AARP
ACORN
ADA Watch
Advancement Project
African Methodist Episcopal Church
Alaska Federation of Natives
Alaska Inter-Tribal Council
Alliance for Retired Americans
Alpha Kappa Alpha Sorority, Inc.
Alpha Phi Alpha Fraternity, Inc.
American-Arab Anti-Discrimination Committee
American Association for Affirmative Action
American Association of People with Disabilities
American Association of University Women
American Baptist Churches, U.S.A.-National Ministries
American Civil Liberties Union
American Council of the Blind
American Ethical Union
American Federation of Government Employees
American Federation of Labor- Congress of Industrial Organizations
American Federation of State, County & Municipal Employees, AFL-CIO
American Federation of Teachers, AFL-CIO
American Friends Service Committee
American Jewish Committee
American Jewish Congress

American Nurses Association
American Postal Workers Union, AFL-CIO
American Society for Public Administration
American Speech-Language-Hearing Association
Americans for Democratic Action
Anti-Defamation League
Appleseed
Asian American Justice Center
Asian Pacific American Labor Alliance
Associated Actors and Artistes of America, AFL-CIO
Association for Education and Rehabilitation of the Blind and Visually Impaired
B'nai B'rith International
Brennan Center for Justice at New York University School of Law
Building & Construction Trades Department, AFLCIO
Catholic Charities, USA
Center for Community Change
Center for Responsible Lending
Center for Women Policy Studies
Children's Defense Fund
Church of the Brethren-World Ministries Commission
Church Women United
Citizens' Commission on Civil Rights
Coalition of Black Trade Unionists
Common Cause
Communications Workers of America
Community Action Partnership
Community Transportation Association of America
DC Vote
Delta Sigma Theta Sorority
Disability Rights Education and Defense Fund

Division of Homeland Ministries-Christian Church (Disciples of Christ)
Epilepsy Foundation of America
Episcopal Church-Public Affairs Office
Evangelical Lutheran Church in America
FairVote: The Center for Voting and Democracy
Families USA
Federally Employed Women
Feminist Majority
Friends Committee on National Legislation
Global Rights: Partners for Justice
GMP International Union
Hadassah, The Women's Zionist Organization of America
Hotel and Restaurant Employees and Bartenders International Union
Human Rights Campaign
Human Rights First
Improved Benevolent & Protective Order of Elks of the World
International Association of Machinists and Aerospace Workers
International Association of Official Human Rights Agencies
International Brotherhood of Teamsters
International Union, United Automobile Workers of America
Iota Phi Lambda Sorority, Inc.
Japanese American Citizens League
Jewish Community Centers Association
Jewish Council for Public Affairs
Jewish Labor Committee
Jewish Women International
Judge David L. Bazelon Center for Mental Health Law

Kappa Alpha Psi Fraternity
Labor Council for Latin American Advancement
Laborers' International Union of North America
Lambda Legal
Lawyers' Committee for Civil Rights Under Law
League of Women Voters of the United States
Legal Momentum
Mashantucket Pequot Tribal Nation
Matthew Shepard Foundation
Mexican American Legal Defense and Education Fund
Na'Amat USA
NAACP Legal Defense and Educational Fund, Inc.
National Alliance of Postal & Federal Employees
National Association for Equal Opportunity in Higher Education
National Association for the Advancement of Colored People (NAACP)
National Association of Colored Women's Clubs, Inc.
National Association of Community Health Centers
National Association of Human Rights Workers
National Association of Negro Business & Professional Women's Clubs, Inc.
National Association of Neighborhoods
National Association of Protection and Advocacy Systems
National Association of Social Workers
National Bar Association
National Black Caucus of State Legislators
National Catholic Conference for Interracial Justice
National Coalition for the Homeless
National Coalition on Black Civic Participation
National Coalition to Abolish the Death Penalty
National Committee on Pay Equity
National Community Reinvestment Coalition

National Conference of Black Mayors, Inc.
National Congress for Community Economic Development
National Congress for Puerto Rican Rights
National Congress of American Indians
National Council of Catholic Women
National Council of Churches of Christ in the U.S.
National Council of Jewish Women
National Council of La Raza
National Council of Negro Women
National Council on Independent Living
National Education Association
National Employment Lawyers Association
National Fair Housing Alliance
National Farmers Union
National Federation of Filipino American Associations
National Gay & Lesbian Task Force
National Health Law Program
National Institute For Employment Equity
National Korean American Service and Education Consortium, Inc. (NAKASEC)
National Lawyers Guild
National Legal Aid & Defender Association
National Low Income Housing Coalition
National Organization for Women
National Partnership for Women & Families
National Puerto Rican Coalition
National Sorority of Phi Delta Kappa, Inc.
National Urban League
National Women's Law Center
National Women's Political Caucus
Native American Rights Fund
Newspaper Guild

Office of Communications of the United Church of Christ, Inc.
Omega Psi Phi Fraternity, Inc.
Open Society Policy Center
OCA (formerly known as Organization of Chinese Americans)
Paralyzed Veterans of America
Parents, Families, Friends of Lesbians and Gays
People for the American Way
Phi Beta Sigma Fraternity, Inc.
Planned Parenthood Federation of America, Inc.
Poverty & Race Research Action Council (PRRAC)
Presbyterian Church (USA)
Pride at Work
Progressive National Baptist Convention
Project Equality, Inc.
Puerto Rican Legal Defense and Education Fund, Inc.
Religious Action Center of Reform Judaism
Retail Wholesale & Department Store Union, AFL-CIO
Secular Coalition for America
Service Employees International Union
Servicemembers Legal Defense Network
Sigma Gamma Rho Sorority, Inc.
Sikh American Legal Defense and Education Fund
Southeast Asia Resource Action Center (SEARAC)
Southern Christian Leadership Conference
Southern Poverty Law Center
The Association of Junior Leagues International, Inc.
The Association of University Centers on Disabilities
The Justice Project
The National Conference for Community and Justice
The National PTA

Union for Reform Judaism
Unitarian Universalist Association
UNITE HERE!
United Association of Journeymen & Apprentices of the Plumbing& Pipe Fitting Industry of the U.S. & Canada-AFL-CIO
United Brotherhood of Carpenters and Joiners of America
United Church of Christ-Justice and Witness Ministries
United Farm Workers of America, AFL-CIO
United Food and Commercial Workers International Union
United Methodist Church-General Board of Church & Society
United Mine Workers of America
United States Conference of Catholic Bishops
United States Students Association
United Steelworkers of America
United Synagogue of Conservative Judaism
Women of Reform Judaism
Women's American ORT
Women's International League for Peace and Freedom
Workers Defense League
Workmen's Circle
YMCA of the USA, National Board
YWCA of the USA, National Board
Zeta Phi Beta Sorority, Inc.

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No. 06-1595

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In the Supreme Court of the United States

VICKY S. CRAWFORD,

Petitioner,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, NATIONAL EMPLOYMENT LAW PROJECT, AND PUBLIC JUSTICE, P.C., AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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A. An internal sexual-harassment investigation must be a "Title VII investigation" or "proceeding" for purposes of the participation clause of Section 704(a) because employers and employees, alike, rely on these investigations to achieve Title VII's goal of identifying and eliminating unlawful practices from the workplace. . . . 12

B. Interpreting "opposition" to include only acts that are "active," "consistent," and "overt" inappropriately raises the threshold for protected conduct under Section 704(a), and thereby undermines the truth-finding function that internal investigations serve and that Title VII's anti-retaliation provision seeks to uphold. 15

II. The Sixth Circuit's decision improperly emphasizes the timing of an employee's conduct, and thereby places unnecessary and unworkable burdens on both the EEOC and employment practitioners whose clients are asked to participate, in some manner, in their employers' internal investigations. 20

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2 EEOC COMPLIANCE MANUAL § 2-II(A)(5) (1998), *available at* http://eeoc.gov/policy/docs/threshold.html 16, 17

2 EEOC COMPLIANCE MANUAL, § 8 (1998), *available at* http:// www.eeoc.gov/policy/docs/retal.pdf 16, 18, 19

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STATEMENTS OF INTEREST OF *AMICI CURIAE*[1]

***Amicus* the National Employment Lawyers Association (NELA)** is the only professional membership organization in the country comprised of lawyers who represent employees in labor, employment, and civil rights disputes. NELA and its 67 state and local affiliates have a membership of over 3,000 attorneys committed to working for those who have been illegally treated in the workplace. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. NELA advocates for employee rights and workplace fairness, while promoting the highest standards of professionalism, ethics, and judicial integrity.

NELA is interested in this case, and is filing a Brief in support of Petitioner Vicky S. Crawford because of the potential detrimental effects that the Sixth Circuit's decision, if left intact, will have on workers' rights and employers' responsibilities regarding sexual-harassment investigations. The Sixth Circuit's narrow interpretation of "protected activity" for purposes of Title VII's anti-retaliation provision undermines the goals of Title VII's anti-discrimination

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[1] Pursuant to Rule 37.6, the *Amici* submit that no counsel for any party participated in the authoring of this document, in whole or in part. In addition, no other person or entity, other than the *Amici*, has made any monetary contribution to the preparation and submission of this document. Pursuant to Rule 37.3, letters consenting to the filing of this Brief are filed with the Clerk of the Court.

provisions by chilling the truth-finding process that lies at the heart of Title VII.

By denying protection to an employee-witness who complied with her employer's internal investigatory procedures, the Sixth Circuit's decision pits employee against employer, and subverts Title VII's goal of voluntary compliance, which requires employers and employees to cooperate in identifying and eradicating sexual harassment, as well as other forms of discrimination in the workplace.

Lastly, the Sixth Circuit's decision will have a negative impact on the EEOC, and on practitioners who are trying to advise their clients who are called upon to participate, in some manner, in an internal sexual-harassment investigation. By creating a requirement that an EEOC charge be filed in order to ensure protection for certain types of conduct occurring during internal investigations, the EEOC will be deluged with "preemptive" charges, employees will face a Hobson's choice with respect to responding to an internal investigation, and practitioners will be in a position of advising witnesses to either file an EEOC charge on behalf of a third party, or engage in insubordination by refusing to cooperate.

Because these outcomes are wholly undesirable and contrary to congressional intent with respect to both Title VII and its anti-retaliation provision, this Court must reverse the Sixth Circuit's decision in this case to maintain appropriate order and balance within Title VII's anti-retaliation scheme.

***Amicus* the American Association of University Professors (AAUP)** was founded in 1915, and is an association of over 46,000 faculty members and other academic professionals in all academic disciplines. The AAUP has participated before this Court in numerous *amicus* briefs, including *Garcetti v. Ceballos*, 547 U.S. 410 (2006); *Smith v. City of Jackson*, 544 U.S. 228 (2005); and *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005). The Association has taken a strong stand against discrimination by institutions of higher education. *See, e.g.*, On Discrimination, POLICY DOCUMENTS & REPORTS 299 (10th ed. 2006).

In addition, the Association recommends that procedures for investigating allegations of sexual harassment by, or against, faculty members recognize the integral role faculty must have in such investigations. *See* Sexual Harassment: Suggested Policy and Procedures for Handling Complaints, *id.* at 244. The AAUP's suggested procedure recognizes that faculty members and other employees may be asked to participate in a faculty review committee hearing well before the initiation of legal proceedings. *Id.* at 244, 245. Without the assurance that those witnesses will be protected against retaliation, such committees could not function effectively. *See also* Statement on Government of Colleges and Universities, *id.* at 135 (generally advocating for an integral faculty role in university and college governance). The AAUP believes that protecting the functioning of investigative committees and the witnesses who appear before them is integral to ensuring effective measures against harassment in academe and protecting institutional self-governance at universities

and colleges. The Sixth Circuit's decision, if allowed to stand, would undermine the critically important interest in protecting employees who cooperate with internal investigations of harassment and other forms of discrimination.

***Amicus* the National Employment Law Project (NELP)** is a non-profit legal organization with over 30 years of experience advocating for the employment and labor rights of low-wage and immigrant workers. In partnership with community groups, unions, and proactive public agencies, NELP seeks to ensure that all employees, and especially the most vulnerable ones, receive the full protection of employment laws, regardless of an individual's immigration status as an immigrant.

NELP's areas of expertise include the workplace rights of documented and undocumented immigrant workers under federal employment and labor laws. NELP has litigated and participated as *amicus* in numerous cases addressing the rights of immigrant workers under the Fair Labor Standards Act and the National Labor Relations Act, state workers' compensation, and other acts. NELP also provides legal assistance to labor unions and immigrant worker organizations regarding the rights of immigrant workers in relation to the Bureau of Immigration and Customs Enforcement, formerly the Immigration and Naturalization Service, and state and local law enforcement.

***Amicus* Public Justice, P.C.,** is a national public interest law firm dedicated to preserving access to justice and holding the powerful accountable in the

courts. Public Justice specializes in precedent-setting and socially significant individual and class action litigation. Litigating throughout federal and state courts, Public Justice prosecutes cases designed to advance civil rights and civil liberties, consumer and victims' rights, environmental protection and safety, workers' rights, toxic torts, the preservation of the civil justice system, and the protection of the poor and powerless.

We also have special projects that preserve access to justice by fighting federal preemption, unnecessary court secrecy, class action bans and abuses, the misuse of mandatory arbitration, and other efforts to deprive people of their day in court. Public Justice is dedicated to fighting discrimination and retaliation in the workplace, schools, and places of public accommodation. We have litigated numerous discrimination and retaliation cases under federal civil rights statutes, including Title VII of the Civil Rights Act of 1964, Title VI of the Civil Rights Act of 1964, and Title IX of the Education Amendments of 1972.

Based on Public Justice's experience and expertise in litigating discrimination and retaliation cases, we believe that the Sixth Circuit's narrow interpretation of Title VII's anti-retaliation provision unjustifiably fails to protect employees who cooperate with, but do not initiate, internal company investigations. Denying protection in these circumstances will deter employees – especially women – from telling their employers about harassment and other forms of discrimination, thereby hindering the discovery and elimination of Title VII violations.

SUMMARY OF THE ARGUMENT OF *AMICI CURIAE*

When Petitioner Vicky S. Crawford's employer, the Metropolitan Government of Nashville & Davidson County, was investigating reports of sexual harassment by a particular supervisor, the investigator asked her if she had witnessed any such sexual harassment. Crawford answered her employer's questions truthfully and relayed that she, too, had been sexually harassed by this supervisor. Crawford alleges that she was terminated for providing damaging evidence against the supervisor during the internal investigation.

The Sixth Circuit subsequently held that even if Crawford was, indeed, terminated for what she said in response to her employer's investigatory questions, that conduct fell outside the scope of the anti-retaliation protections of Section 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a). According to the Sixth Circuit, Crawford's conduct was neither "participation," nor "opposition" protected under Section 704(a).

Whether viewed under the "participation clause" or the "opposition clause" of Section 704(a), Crawford's conduct must be protected against employer retaliation. Congress enacted Title VII to eradicate discrimination, and included an anti-retaliation provision to secure that objective by preventing employers from interfering with employee efforts to advance the goals of Title VII's anti-discrimination provisions.

This Court has recognized that the preferred method for eradicating unlawful discrimination is voluntary compliance by employers. The success of voluntary compliance depends on employees speaking out about, and bearing witness to, unlawful discriminatory conduct in the workplace. Thus, the cornerstone of any employer's voluntary compliance effort is a truth-finding process that contemplates open communications between employer and employee, which are designed to identify and remedy unlawful discrimination and harassment in the workplace.

The Sixth Circuit's interpretation of both the participation and opposition clauses of Section 704(a) is not only contrary to Congress's intent and this Court's established precedent, but also wholly undermines the truth-seeking process on which effective enforcement of Title VII depends. By excluding internal employer investigations from the protections of the participation clause, the Sixth Circuit's decision chills the testimony of would-be witnesses, who, under the Sixth Circuit's strained reading of Section 704(a), are left unprotected from retaliation for providing truthful – and sometimes damaging – information to their employers. As a result, internal investigations will be stymied and employers will be hampered in their efforts to ascertain the truth of what happened, and thus will be unable take appropriate action to prevent what may be unlawful discrimination or harassment.

Similarly, by construing the opposition clause to protect only conduct that is "overt," "active," and "consistent," the Sixth Circuit's decision creates a barrier to achieving Title VII's goals by excluding

various types of employee conduct that should otherwise be protected under Section 704(a).

The only limitation courts have traditionally placed on opposition conduct is that it must be reasonable and in good faith. Construing the opposition clause broadly – but with appropriate limitation on the reasonableness of employee conduct – ensures that employees will come forward to identify conduct they believe violates the law, or will provide further information to corroborate other reports of violative conduct.

Unfettered access to such critical information from a key source – employees – ensures that employer investigations maintain their efficacy within the Title VII scheme. However, by excluding a wide range of employee conduct from opposition protection, the Sixth Circuit's decision hinders the truth-finding process that underlies an employer's investigatory efforts by chilling employees' words and actions that would initiate, or further, these efforts.

The Sixth Circuit's holding also requires an EEOC charge to have been filed before conduct like Crawford's becomes protected by Section 704(a) – a wholly improper emphasis on the timing of an employee's conduct. Under the Sixth Circuit's analysis, the key inquiry is no longer *what* the employee did, but *when* she did it. This result is contrary to the plain language of Section 704(a) and Congress's intent, and it creates significant problems for the EEOC, as well as practitioners advising clients who are victims, or witnesses, or both.

Witnesses and victims alike will now be forced to file "preemptive" EEOC charges for the sole purpose of protecting their participation in any investigatory process designed to ascertain the validity of the allegation and address it appropriately. Such an influx of charges will strain the resources of the EEOC, and will frustrate the purpose of voluntary compliance, which seeks to discourage initial involvement of the EEOC and the courts, and encourage resolutions reached by the employer and its employees.

Practitioners advising victims and witnesses must likewise encourage those individuals to be wary of any employer internal processes, and, instead, file an EEOC charge to ensure protection from retaliation for participating in the employer's investigation. Worse, practitioners whose clients are not in a position to file an EEOC charge must advise these individuals of the perils of participating in the employer's investigation: answer questions, and be subject to retaliation for doing so; or refuse to answer questions and be subject to discipline for insubordination.

Because the Sixth Circuit's constrained interpretation of the opposition and participation clauses of Section 704(a) severely impairs the truth-finding process underlying Title VII's remedial scheme, and creates untenable obstacles for employment practitioners and their clients, the *Amici* respectfully request that this Court REVERSE the Sixth Circuit's decision.

ARGUMENT

I. Excluding an employer's internal investigation of sexual harassment from protection under Section 704(a) of Title VII chills the truth-finding process, which is protected by both the "participation" and "opposition" clauses of the anti-retaliation provision, and which is vital to upholding and enforcing Title VII's remedial scheme.

Section 704(a) of Title VII of the Civil Rights Act of 1964 prohibits employers from retaliating against individuals who oppose practices that are unlawful under Title VII, and who participate in Title VII proceedings:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a) (2007).

In the recent decision in *Burlington Northern & Santa Fe Railway Co. v. White*, this Court plainly held that Section 704(a) serves to protect employees who complain to their employers about Title VII violations. *See generally* 548 U.S. 53, 126 S.Ct. 2405 (2006). According to *Burlington Northern*, the law prohibits "employer actions that are likely 'to deter victims of

discrimination from complaining to the EEOC,' the courts, and their employers." *Id.* at 2415 (internal citations omitted).

The *Burlington Northern* decision dovetails with this Court's prior precedent recognizing that effective internal employer grievance processes are critical to preventing discriminatory conduct before the conduct becomes unlawful. *See, e.g., Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764, 118 S.Ct. 2257 (1998); *Faragher v. Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275 (1998); *Pennsylvania State Police v. Suders*, 542 U.S. 129, 145, 124 S.Ct. 2342 (2004) ("an employer's effort to install effective grievance procedures could serve Title VII's deterrent purpose by encouraging employees to report harassing conduct before it becomes severe or pervasive") (internal citation omitted).[2]

This Court has also recognized that Congress's express purpose in enacting Title VII's remedial measures was to induce employers to "self-examine" and eliminate discrimination:

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[2] In a recent public-employee speech case, *Garcetti v. Ceballos*, this Court also recognized the robustness and importance of "the powerful network of legislative enactments – such as whistleblower protection laws and labor codes – available to those who seek to expose wrongdoing." 547 U.S. 410, 126 S.Ct. 1951, 1962 (2006). To permit the Sixth Circuit's construction of Title VII to stand would be to undermine this Court's assurance in *Garcetti* that employees willing to partake in exposing misconduct can continue to rely on the web of protective legislation designed to deter against and remedy such misconduct.

> Congress designed the remedial measures in these statutes to serve as a "spur or catalyst" to cause employers "to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges" of discrimination.

McKennon v. Nashville Banner Pub. Co., 513 U.S. 352, 358, 115 S.Ct. 879 (1995) (internal citations omitted).

The importance of this process is reinforced by guidance from the EEOC interpreting and implementing the decisions of this Court, such as *Faragher* and *Ellerth*. *See* 29 C.F.R §1604.11, App. A (2007) (extending a "safe harbor" to employers undertaking an affirmative process to eradicate even the need to file a charge). Thus, the integrity of this pre-charge process hinges on employees participating in this process with a full guarantee that they will receive the same protections as those who participate in an ensuing investigation, should a charge be filed.

A. An internal sexual-harassment investigation must be a "Title VII investigation" or "proceeding" for purposes of the participation clause of Section 704(a) because employers and employees, alike, rely on these investigations to achieve Title VII's goal of identifying and eliminating unlawful practices from the workplace.

The participation clause of Section 704(a) protects employee conduct that includes filing a charge, testifying, assisting, or participating *in any manner* in

"an investigation, proceeding, or hearing under [Title VII]." 42 U.S.C. § 2000e-3(a) (2007) (emphasis added). This clause is intended to be construed broadly. *E.g.*, *Deravin v. Kerik*, 335 F.3d 195 (2d Cir. 2003) ("participation clause is expansive and seemingly contains no limitations"); *Clover v. Total Sys. Servs., Inc.*, 176 F.3d 1346, 1353 (11th Cir. 1999) ("The words 'participate in any manner' express Congress' intent to confer 'exceptionally broad protection' ").

In fact, courts have interpreted the participation clause so broadly as to protect not only individuals who provide information supporting or corroborating a report of discrimination or harassment, but even the individual who is the alleged harasser or discriminator:

> [I]t may well advance the remedial purpose of Title VII to shield all participation, including participation by an employee accused of illegal discrimination, to ensure the overall integrity of the administrative process and encourage truthful testimony.

Deravin, 335 F.3d at 204. In addition, courts have rejected arguments that only "reasonable" testimony is protected by the participation clause. *See, e.g.*, *Glover v. South Carolina Law Enforcement Div.*, 170 F.3d 411, 414 (4th Cir. 1999) (rejecting employer's contention that plaintiff's "unreasonable" deposition testimony was unprotected).

Protecting the victim, the accused, and even a witness who provides "unreasonable" testimony ensures investigators that they have unfettered access

to all information necessary to determining whether unlawful conduct did, in fact, occur. *See id.* ("Section 704(a)'s protections ensure . . . that investigators will have access to the unchilled testimony of witnesses."). Accordingly, interpreting Section 704(a)'s participation clause broadly to include all manner of participation is vital to ensuring that an employer's internal investigators may ascertain the truth of the allegations giving rise to an investigation.

In this case, the Sixth Circuit's myopic interpretation of the participation clause leaves employees such as Vicky Crawford vulnerable to retaliation for answering questions during an employer's internal investigation of a sexual-harassment report by another employee. If employees are not protected by Title VII's anti-retaliation provision, they will be placed in an untenable position. When they are asked to participate in such a voluntary compliance process, they will be caught between their employer's request and a very reasonable fear that, if they comply, they will be vulnerable to retaliation.

As a result, witnesses who are asked to be interviewed in an internal investigation may refuse or otherwise feign ignorance or forgetfulness, undermining the clear intent of Title VII. Worse, these witnesses may go so far as to lie about what they know, or hold back details that are essential to ascertaining the validity of the allegations. Compromised witness testimony will render it difficult, if not impossible, for internal investigators to determine what happened and what action to take, if necessary.

Accordingly, without meaningful witness testimony during an internal investigation, the employer's efforts to seek the truth and take appropriate action are thwarted. Because the Sixth Circuit's decision hampers employers' ability to fully and fairly investigate reports of harassing conduct by rendering witness testimony impossible to obtain, or patently unreliable, its decision has likewise eviscerated what this Court has long recognized as Title VII's goal of eradicating unlawful discriminatory and harassing conduct, and fostering voluntary compliance.

Accordingly, the *Amici* respectfully request that this Court reverse the Sixth Circuit's decision and recognize that employers' internal investigations are, indeed, an integral part of the process of Title VII investigations and proceedings for purposes of Section 704(a).

B. Interpreting "opposition" to include only acts that are "active," "consistent," and "overt" inappropriately raises the threshold for protected conduct under Section 704(a), and thereby undermines the truth-finding function that internal investigations serve and that Title VII's anti-retaliation provision seeks to uphold.

Section 704(a)'s opposition clause protects any employee who "has opposed any practice made an unlawful employment practice by this subchapter. . . ." 42 U.S.C. § 2000e-3(a) (2007). The opposition clause has been consistently interpreted broadly, excluding only employee conduct that is unreasonable or demonstrates bad faith. *See, e.g., Johnson v.*

University of Cincinnati, 215 F.3d 561, 580 (6th Cir. 2000) ("the only qualification . . . is the manner of his opposition must be reasonable."); *Cruz v. Coach Stores, Inc.*, 202 F.3d 560 (2d Cir. 2000) (slapping harasser is not opposition activity); *Smith v. Texas Dep't of Water Resources*, 818 F.2d 363 (5th Cir. 1987); *Hochstadt v. Worcester Found. For Experimental Biology*, 545 F.2d 222 (1st Cir. 1976); *see also* 2 EEOC COMPLIANCE MANUAL, § 8, p. 8-7 (1998), *available at* http://www.eeoc.gov/policy/docs/retal.pdf ("manner of opposition must be reasonable").

The EEOC has specifically addressed employees responding to inquiries during internal investigations, characterizing employee responses as "opposition":

> In the Commission's view, when an employer initiates an internal investigation of alleged discrimination in the workplace, an employee who is invited (or required) to cooperate with the inquiry has an objectively reasonable belief that, by providing relevant information to the designated investigators, s/he is opposing a practice made unlawful by Title VII.

2 EEOC COMPLIANCE MANUAL § 2-II(A)(5), n. 41 (1998), available at http://eeoc.gov/policy/docs/threshold.html.

This definition of "opposed," as used in Section 704(a), should include all conduct reasonably aimed at assisting with the process of determining whether unlawful conduct under Title VII occurred – which, by definition, must include answering an employer's inquiries during an internal investigation aimed at

prompt remedial action. In fact, the EEOC has specifically defined "opposition" to include providing such information:

> Because encouraging employers to discover and prevent discriminatory practices in the workplace is a primary objective of Title VII, an employee who assists his/her employer in this endeavor is, by definition, opposing practices made unlawful by Title VII. The very fact that the employer has initiated an investigation of alleged discrimination is sufficient to demonstrate the "objective reasonableness" of the employee's belief that, by providing information relevant to the inquiry, s/he is opposing an employment practice made unlawful by Title VII.

Id. (rejecting the 11th Circuit's decision in *Clover v. Total Sys. Serv's, Inc.*, 176 F.3d 1346 (11th Cir. 1999)).

Moreover, "opposing" need not mean "complaining." Indeed, the same opposition clause language under the Americans with Disabilities Act, 42 U.S.C. §12203(a), has been interpreted to allow a simple request for accommodation under the ADA to constitute protected activity, even before any formal charge is filed. *Soileau v. Guilford of Maine*, 105 F.3d 12, 16 (1st Cir. 1997) ("It would seem anomalous . . . to think Congress intended no retaliation protection for employees who request a reasonable accommodation unless they also file a formal charge."); *see also Garza v. Abbott Labs.*, 940 F. Supp. 1227, 1294 (N.D. Ill. 1996) (plaintiff engaged in statutorily protected expression by requesting accommodation for her disability); 2 EEOC

COMPLIANCE MANUAL, § 8, p. 8-6 (1998), *available at* http:// www.eeoc.gov/policy/docs/retal.pdf.

In this case, the Sixth Circuit improperly rejected Crawford's reliance on the opposition clause because her conduct was not "active," "consistent," or "overt." By imposing limitations on the definition of opposition conduct that go well beyond "good faith" and "reasonable," the Sixth Circuit's decision severely undermines the purpose of an employer's internal investigation, and exposes employees to retaliation for voluntarily complying with such investigations.

Surely those who cooperate in internal investigations of sexual-harassment complaints – and particularly those who provide corroborating information, as Crawford did – are seeking to expose wrongdoing. Witnesses such as Crawford must be able to rely on legislative guarantees designed to protect the process by which employees expose wrongdoing, and thereby seek to assist their employers in remedying it. However, the Sixth Circuit's narrow construction of Section 704(a) in this case threatens the process of identifying and exposing wrongdoing by taking away from would-be witnesses any guarantee that their role in the system will remain protected under the legislative provisions designed specifically for their benefit.

In addition, raising the bar for protected opposition conduct to such a heightened level excludes a host of activities by employees that is designed to assist an employer's voluntary compliance with Title VII's mandates of identifying unlawful conduct, and determining whether it did, in fact, occur, and taking

prompt remedial action. For example, if an employer asks a complainant's supervisor to "encourage" the complainant to drop her complaint, and the supervisor reasonably refuses to do so, the supervisor has engaged in a single act. By refusing her employer's request to deter the complainant, the supervisor places her employer on notice that she will not be complicit in an effort to circumvent the process necessary to Title VII's aim of identifying potentially unlawful conduct and taking prompt remedial action.[3]

Under the Sixth Circuit's decision in this case, however, the supervisor's refusal to act – though reasonable and in good faith – would not be protected opposition conduct because it is not "overt," "active," or "consistent." This is so even though both employee and employer understand the clear message behind the refusal. Thus, the employer would be free to terminate the supervisor in retaliation for her refusal to support the employer's effort to obfuscate the truth-finding process, and thereby shirk its duty under Title VII to provide a discrimination-free workplace.

Similarly, in this case, the fact that Vicky Crawford did not initiate the discourse with her employer regarding the egregious acts of harassment that Hughes inflicted upon her is of no consequence. By

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[3] This example was taken from the EEOC Compliance Manual, which states that "refusal to obey an order also constitutes protected opposition if the individual reasonably believes that the order makes discrimination a term or condition of employment." 2 EEOC COMPLIANCE MANUAL, § 8, p. 8-6 (1998), *available at* http:// www.eeoc.gov/policy/docs/retal.pdf.

answering the Metro investigator's questions, Crawford was acting reasonably and in good faith to make her employer aware of the truth about this supervisor's conduct towards other women in the same workplace – thereby, "opposing" his conduct towards her.

The Sixth Circuit's artificial restrictions on "opposition" under Section 704(a) serve only to exclude conduct that otherwise serves as a reasonable and good-faith effort to assist employers in voluntarily complying with Title VII. Accordingly, because these restrictions are contrary to the overlapping goals of Title VII's anti-discrimination provisions and Section 704(a) vis-à-vis the truth-finding processes of internal investigations, this Court must reverse the Sixth Circuit's decision.

II. The Sixth Circuit's decision improperly emphasizes the timing of an employee's conduct, and thereby places unnecessary and unworkable burdens on both the EEOC and employment practitioners whose clients are asked to participate, in some manner, in their employers' internal investigations.

Lower courts have consistently recognized that Section 704(a) is intended to protect employees during their interactions with their employers about potential Title VII violations, even before a formal charge is filed with the EEOC. In the context of disputes concerning the application of the opposition clause, the policy favoring protection for an employee's participation in internal investigations by employers before an EEOC charge is pending has been routinely acknowledged.

See, e.g., Parker v. Baltimore & Ohio R. Co., 652 F.2d 1012, 1019 (D.C. Cir. 1981); *Berg v. La Crosse Cooler Co.*, 612 F.2d 1041 (7th Cir. 1980); *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978).

In this case, the crux of the problem created by the Sixth Circuit's interpretation of both the participation and opposition clauses is the timing of the conduct in question. The Sixth Circuit's decision creates obstacles to both opposition and participation protection that hinge on nothing more than when the employee's conduct occurred; thus, under the Sixth Circuit's interpretation of Section 704(a), the key inquiry is no longer *what* the employee did, but *when* she did it.

In Crawford's case, under the Sixth Circuit's decision, a simple change in the timing of her conduct would produce a completely opposite result under both the participation and opposition clauses of Section 704(a). If Crawford had participated in her employer's investigation after another employee had filed an EEOC charge relating to Hughes's harassment, her conduct would clearly be protected under Section 704(a)'s participation clause. And if Crawford had reported Hughes's conduct to Metro before its investigator approached her, her conduct would clearly be protected under Section 704(a)'s opposition clause.

The illogicality of the Sixth Circuit's interpretation of Section 704(a) is further underscored by this scenario: if the Metro investigator brought Crawford to her office to ask her questions about Hughes's conduct in the workplace, to avoid permissible retaliation for

simply answering those questions, Crawford would have to refuse to respond. Then, to guarantee herself protection from her employer's retaliation, Crawford would have to immediately return to the investigator's office to lodge her own report about the harassment she endured, and then – and only then – answer the investigator's questions. Such a convoluted scenario is not what Congress intended when it enacted Title VII, and it is wholly inconsistent with this Court's interpretation of Section 704(a).

By elevating the timing of the employee's conduct to the forefront of the analysis under Section 704(a), the Sixth Circuit's decision will also create serious problems for the EEOC and for employment practitioners advising clients who are both the victims of unlawful harassment, and witnesses in their employers' internal investigations. Under a scheme where the substance of the employee's conduct is subordinated to the timing of it, the process of determining sufficient facts to identify and eradicate unlawful discrimination will be harmed.

Because the Sixth Circuit's decision requires that an EEOC charge be filed before participation conduct may occur, victims of harassment will now rightly feel that they must not only report the harassment to their employer, but also immediately report it – prematurely – to the EEOC. Likewise, practitioners must advise their victim-clients to immediately file a charge with the EEOC, as well as report the conduct to the employer.

With respect to clients who are witnesses in an investigation, practitioners must advise these clients

to stave off the employer's questioning during any internal process unless they are assured that an EEOC charge has been filed. If no charge has been filed, or if the witness-client is unsure, practitioners must advise this client that, to be protected from retaliation, he or she must first file EEOC charges on behalf of the alleged victim. If the witness has also been the victim of harassment – as Crawford was – the practitioner must advise the witness to refuse to answer questions until she files her own EEOC charge. Although the practitioner could advise the witness/victim to file an internal report about the harassment, if that report does not rise to the level of conduct required by the Sixth Circuit, it is not guaranteed to be protected activity. Thus, the only definite guarantee of protection from retaliation is to file an EEOC charge.

Under any of these scenarios, the EEOC will be deluged by "preemptive" charges filed by victims, witnesses, and, in some cases, both, for the sole purpose of ensuring protection from retaliation against witnesses in any employer investigation. This onslaught of charges – especially where they are duplicative – will undoubtedly place an added strain on the resources of the agency, and will likely result in the dismissal of these charges, based on the standards for proving actionable sexual harassment.

If the victim-client is unwilling, or unable, to file an EEOC charge, then practitioners will be forced to advise the victim that her efforts to assist her employer in identifying and eradicating potentially unlawful conduct may leave her unprotected. Without statutory protection for employee-witnesses, any investigation of the victim's report will be suspect at

best, and may even result in adverse action against the victim for making what the employer perceives to be unsupported allegations against a co-worker or supervisor.

Likewise, if the witness-client is unwilling, or unable, to file a charge with the EEOC – for example, because he simply does not have all of the facts – then the practitioner must advise the would-be witness that he participates in his employer's internal investigation at his peril. This presents the witness-employee with the Hobson's choice of answering his employer's questions honestly, and being vulnerable to termination in return; or engaging in insubordination by refusing to comply with the employer's request to participate in the investigation.

While Title VII does allow for charges to be filed by any person on behalf of a victim of harassment, certainly the law was not enacted to protect against a timing technicality problem. Rather, as this Court has repeatedly recognized, Congress's objective was to minimize the need to resort to the EEOC and the courts, and create a system of voluntary compliance. Instead, the Sixth Circuit's decision drives victims and witnesses directly to the formal EEOC process and to the courts – to the extent they are not chilled from reporting or participating in the first place – in an effort to ensure that they will not suffer adverse employment action for providing their employers with truthful information in response to an internal sexual-harassment investigation.

Because the ramifications of the Sixth Circuit's decision extend beyond the facts of this particular case,

and have the potential to impact the victims of sexual harassment, the individuals who bear witness to the harassment, and the practitioners trying to advise both groups of their legal rights and remedies, the Sixth Circuit's opinion must be reversed.

CONCLUSION

For all of the above reasons, the *Amici Curiae* filing this brief in support of Petitioner Vicky S. Crawford respectfully request that this Honorable Court REVERSE the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

VICKY S. CRAWFORD,
Petitioner
v.
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICUS CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

The National School Boards Association ("NSBA") is a not-for-profit federation of state school boards associations located throughout the United States. NSBA and the members of its federation together currently represent more than 95,000 school board members, who govern approximately 15,000 local school districts across the country. These school districts employ more than 3 million teachers[2] as well as various staff employees, ranging from paraprofessionals, psychologists, and social workers, to bus drivers, custodians, building maintenance workers, and food service workers. Taken as a whole, the public school districts represented by NSBA constitute the single largest government employer in the nation, which is responsible for educating more than 47 million public school students.

In this case, NSBA seeks to provide the Court with argument and authority in support of its contention that passive involvement in an employer's internal investigation is neither opposition nor participation clause conduct under Title VII of the Civil Rights Act of 1964, 42 U.S.C.

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[1] Pursuant to Supreme Court Rule 37.6, no part of this brief was authored by counsel for any party, and no person or entity other than amicus curiae, its members, or its counsel made a monetary contribution to the preparation or submission of the brief. This brief is filed with the written consent of all parties pursuant to Rule 37.3(a), with the requisite consent letters having been filed with the Clerk of this Court.

[2] National Center for Education Statistics, Digest of Education Statistics: 2007, http://nces.ed.gov/programs/digest/d07/tables/dt07_061.asp?referrer=report.

§§ 2000e *et seq.* (2008) ("Title VII"). Further, NSBA seeks to demonstrate how Petitioner's positions, if accepted, would negatively impact school districts across the country.

SUMMARY OF THE ARGUMENT

Adopting Petitioner's view would protect passive involvement in an internal investigation, a position Congress did not envision in enacting Section 704(a) and which does not advance the goal of detecting and eliminating workplace discrimination. As the text of Section 704(a) and cases interpreting this provision make clear, some active involvement is necessary to secure protection under the opposition clause. Title VII has always required employees to step forward to ensure that the goal of eradicating discrimination is achieved. Moreover, the practical implications of allowing passive involvement to qualify as protected activity are profound, particularly for school districts, whose employees are generally scattered across multiple worksites and which are called upon to address the needs and concerns of a wide variety of constituencies. Further, if Petitioner's view is adopted, poorly performing employees could use Title VII as a sword to insulate themselves from adverse employment action by intentionally involving themselves in an internal investigation.

Petitioner's position regarding Title VII's participation clause is also without support. Each court that has had occasion to consider such an argument has flatly rejected it, and for good reason, since the text of Section 704(a) unequivocally requires that employees only receive protection with

respect to investigations that follow filing of a formal charge of discrimination with the EEOC. The practical implications of Petitioner's position are troublesome and unwieldy, and would severely impact the "business judgment rule," which is an essential sphere of discretion within which school districts and other employers must be able to operate in order to conduct their day-to-day business.

Finally, while school boards respect the basic tenants of Title VII, they also believe that an unsupported extension of Title VII will burden our nation's educational institutions. The internal reporting mechanisms created following this Court's decision in *Faragher v. Boca Raton*, 524 U.S. 775 (1998), are working well. There is no need to enlarge the types of conduct Title VII protects, particularly when doing so will lead to unwarranted fiscal and administrative burdens. Had Congress meant to protect passive cooperation, it certainly would have done so. It did not and, respectfully, neither should this Court.

ARGUMENT

I. PROTECTING AN EMPLOYEE'S MERE PASSIVE COOPERATION DURING AN EMPLOYER'S INTERNAL INVESTIGATION OF SEXUAL HARASSMENT UNDER SECTION 704(a) OF TITLE VII IS NOT NECESSARY TO PROMOTE THE DETECTION AND ELIMINATION OF DISCRIMINATION IN THE WORKPLACE.

When Congress enacted Title VII, nearly half a century ago, it adopted Section 704(a), which prohibits acts of retaliation in employment. In pertinent part, Section 704(a) states:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a). Since the enactment of Title VII, this Court has considered the breadth and scope of Section 704(a) on several occasions. *See, e.g., Robinson v. Shell Oil*, 519 U.S. 337 (1997);

Clark County Sch. Dist. v. Breeden, 532 U.S. 268 (2001); and *Burlington Northern & Santa Fe Railway v. White*, 548 U.S. 53 (2006). In each case considered by this Court, the aggrieved employees engaged in an overt and affirmative act of opposition, or had otherwise initiated charge filing activity under Title VII, which triggered the protections of Title VII. In *Robinson* and *Burlington Northern*, the aggrieved employees were expressly protected by Section 704(a)'s participation clause because they filed charges of discrimination with the United States Equal Employment Opportunity Commission ("EEOC"). 519 U.S. at 339; 126 S. Ct at 2409. In *Clark County Sch. Dist.*, the employee initiated complaints about offensive comments to her supervisor and two assistant superintendents. 532 U.S. at 269-270.[3]

In stark contrast to the aggrieved employees in these cases, Petitioner in the instant case, Vicky

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[3] This Court ultimately found that the employee in *Clark County Sch. Dist.* did not engage in opposition activity because no reasonable person could believe that what she complained about was an unlawful practice of the employer. 532 U.S. at 271. Similarly, in the instant case, no reasonable person could believe that Petitioner's interview responses about her alleged harasser (an individual who did not have supervisory authority over Petitioner) describe an unlawful employment practice of Respondent. There is no evidence that Respondent knew or should have known of the alleged misconduct. *See McGinest v. GTE Service Corp.*, 360 F. 3d 1103, 1119 n.13 (9th Cir. 2004)(noting that a negligence standard applies where alleged harasser did not supervise the plaintiff, even if the alleged harasser supervised others); and *Faragher*, 524 U.S. 775, 807 (holding that vicarious liability applies only where actionable harassment is "created by a supervisor with immediate (or successively higher) authority *over the employee*")(emphasis supplied).

Crawford, claims she engaged in protected activity solely because she gave information regarding her own alleged experiences of sexual harassment in response to an internal inquiry undertaken by her employer. Petitioner did not take the initiative to register with her supervisors either a formal or informal complaint opposing any unlawful conduct, nor did she participate in any manner in an investigation, proceeding, or hearing involving the EEOC. It is equally significant that Petitioner never filed with the EEOC any charge complaining that she had been the victim of sexual harassment prior to being terminated by Respondent for legitimate business reasons. As more fully explained below, a person's failure to act or otherwise pursue the available internal or external complaint mechanisms available (such as Petitioner failed to do in this case) compels a conclusion that no activity protected under Title VII has occurred.

A. Section 704(a) Opposition Protects Only Those Employees Who Actively Assist in Bringing Harassment to Light by Reporting or Initiating a Complaint of Unlawful Conduct

1. Active opposition by employees is essential to detecting and eliminating harassment in the workplace.

In her brief, Petitioner opines that the Sixth Circuit erred in determining "that opposition is only protected if it is 'active.'" Pet. Br. 47. Petitioner further contends—without any supporting legal

authority—that the protections of Section 704(a) are not limited merely to those who "initiate" or 'instigate' a complaint." *Id.* (*quoting* Pet. App. 7a). Notwithstanding Petitioner's dramatic references to various historical events to support her contentions, her arguments are devoid of merit. Simply stated, relying on the plain text and unambiguous meaning of Section 704(a), several courts have made it clear, that employees must "initiate," or make "active" or "overt" complaints to trigger the protections of the opposition clause. These cases recognize an important principle at stake in this case: to achieve the goal of eradicating discrimination in the workplace, aggrieved individuals must take the initiative to report discrimination, or avail themselves of the right to seek redress through the filing of a charge of discrimination.

For example, in *Minnis v. McDonnell Douglas Tech. Services*, 162 F. Supp. 2d 718, 739 (E.D. Mich. 2001), a Michigan district court found that "[i]n order to engage in protected opposition activity under Title VII . . . *a plaintiff must make an overt stand against suspected illegal discriminatory action*" (emphasis supplied). Similarly, in *McNorton v. Georgia Dep't of Transp.*, 2007 WL 4481431 at *14 (N.D. Ga. 2007), a federal district court in Georgia determined that an employee's mere cooperation in answering questions during an employer's internal investigation did not constitute protected opposition activity, because to do so would "require this Court to ignore the plain meaning of this statute."[4] Likewise, in *Parker v. Baltimore and*

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[4] In so finding, the district court in *McNorton* observed:

Ohio Railroad, 652 F.2d 1012, 1019 (D.C. Cir. 1981), the Court of Appeals for the District of Columbia noted that "[t]he enforcement scheme Congress chose for Title VII *relies heavily on the initiative of aggrieved employees*" to come forward to report unlawful discrimination (emphasis supplied).

Title VII protects individuals who come forward and oppose discrimination for a reason: an employer cannot redress sexual harassment if it does not know about it. As more than one court has observed, "[t]he law against sexual harassment is not self-enforcing and an employer cannot be expected to correct harassment unless the employee makes a concerted effort to inform the employer that a problem exists." *Shaw v. AutoZone*, 180 F. 3d

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"Oppose" means to "offer resistance to." *Merriam-Webster's Collegiate Dictionary* 816 (10th ed. 1999); *see also The New Oxford American Dictionary* 1201 (2001)("disapprove of and attempt to prevent, esp. by argument"); *The American College Dictionary* 850 (1. to act or contend in opposition to; to drive against; resist; combat. 2. to stand in the way of; hinder. 3. to set as an opponent or adversary. 4. be hostile or adverse to, as in opinion. 5. to set as an obstacle or hindrance; *to oppose reason to force.* 6. to set against in some relation, as of offsetting antithesis, or contrast; *to oppose the advantages to the disadvantages.* 7. to use or take as being opposite or contrary: *words opposed in meaning.* 8. to set (something) over against something else in place, or so as to face or be opposite. 9. to be or act in opposition) (emphasis in original).

2007 WL 4481431 at * 13.

806, 813 (7th Cir. 1999); *see also Barrett v. Applied Radiant Energy*, 240 F. 3d 262, 268 (4th Cir. 2001).

To their chagrin, employers are often in the dark about sexual harassment occurring in the workplace. Many reasons contribute to this lack of awareness. For example, it is often unpleasant, uncomfortable and embarrassing for employees to discuss incidents of harassment with an employer. However, it is well-settled that these reasons do not excuse failing or refusing to come forward and bring to the employer's attention discrimination in the workplace. *See Shaw*, 180 F. 3d at 813 ("we conclude that an employee's subjective fears of confrontation, unpleasantness or retaliation do not alleviate an employee's duty under *Ellerth* to alert the employer to the allegedly hostile environment."); *Coates v. Sundor Brands*, 164 F. 3d 1361, 1366 (11th Cir. 1999) ("the problem of workplace discrimination...cannot be corrected without the cooperation of the victims."). Thus, an employee who fails to meet the duty to come forward and report harassment pursuant to her employer's internal reporting mechanisms cannot sustain a claim for harassment pursuant to this Court's decision in *Faragher*. For the same reasons, an employee who fails to report such allegations under the same internal mechanisms should not be permitted to invoke the protections of Title VII's opposition clause.

School boards and school administrators in particular, often work at different worksites than the employees for whom they are responsible. This makes it difficult to be aware of harassment that may be occurring in the district. Yet, at the same time, school boards are ultimately responsible to

ensure Title VII is not violated. Because school boards are typically removed from the day-to-day operations of the school district, they are extremely unlikely to know about sexual harassment unless a complainant clearly and unequivocally reports the conduct. *See Baynard v. Malone*, 268 F. 3d 228, 236 (4th Cir. 2001)(holding that school board personnel director was not deliberately indifferent to student harassment, in contrast with school principal, who was responsible for "day-to-day supervision" of alleged harasser); *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F. 3d 648, 659 (5th Cir. 1997)(noting that "in large school districts . . . school board members have little contact with the day-to-day interactions between teachers and students."). In the same regard, school administrators typically supervise a large of number of people in a variety of settings, and, at the same time, are responsible for interacting with and addressing the needs of a variety of other constituents, such as students, parents and the public in general. Because of their unique staffing structures, the multiple constituents with which they interact and the fact that they are required to oversee employees scattered throughout multiple locations, school districts must rely on individuals who actively oppose harassment to help them determine when sexual harassment is taking place.

2. Employees who unreasonably fail to use the reporting procedures established by their employers are not engaged in active opposition.

This Court has previously stated that a primary purpose of Section 704(a)'s anti-retaliation provision is maintaining "'unfettered access' to Title VII's remedial mechanisms." *Burlington Northern*, 126 S. Ct. at 2415 (*quoting Robinson*, 519 U.S. at 316). At the same time, this Court has repeatedly made clear in Title VII cases, that "victims have 'a duty to use such means as are reasonable under the circumstances to avoid or minimize the damages that result from violations of the statute.'" *Pennsylvania State Police v. Suders*, 542 U.S. 129, 146 (2004) (*quoting Faragher*, 524 U.S. at 806). In the case *sub judice*, Petitioner did not use such reasonable means, either to protect herself, or to protect other alleged victims of sexual harassment.

As this Court has previously instructed, "Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms. Were employer liability to depend in part on an employer's effort to create such procedures, it would effect Congress' intention to promote conciliation rather than litigation in the Title VII context." *Ellerth v. Burlington Indus.*, 524 U.S. 742, 764 (1998). In keeping with this Court's pronouncement in *Ellerth*, Respondent, like many other school districts, implemented a detailed Employee Harassment Policy. Resp't Br. 31. This policy not only defined the kinds of conduct that

constituted sexual harassment, it further provided detailed instructions on how and to whom to report harassment. In particular this policy stated "[a]ny employee who believes that he/she is the victim of harassment or who witnesses harassment should report the harassment. Employees may report the harassment to any one or all of the following: (A) the employee's supervisor; (B) the supervisor of the offending person; (C) the principal of the employee's school or the head of the employee's department; (D) the Personnel Department, and/or (E) the Title IX Coordinator." http://www.mnps.org/assetfactory.aspx?did=3531. Despite the existence of this policy, Petitioner never reported her alleged experiences of sexual harassment to any of the persons identified therein. Nevertheless, she now attempts to claim protection under Section 704(a) by asserting she "reported" harassment in a manner not contemplated by Respondent's Employee Harassment Policy and to individuals who are not identified within that policy.

In the harassment context, it is well-settled that when an employer provides a reasonable mechanism for reporting harassment and the employee fails or refuses to employ that mechanism, then the employer is entitled to assert an affirmative defense to liability and damages. *See Ellerth*, 524 U.S. at 764-765; *Faragher*, 524 U.S. at 807-808; *Jackson v. Arkansas Dep't of Educ., Voc. and Tech. Educ. Div.*, 272 F.3d 1020, 1025-1026 (8th Cir. 2002) (employee who unreasonably failed to report harassment under her employer's harassment policy until eight months after the harassment occurred was unable to maintain her harassment claim). Why then, should not

Petitioner's failure to reasonably take advantage of the reporting mechanisms contained in Respondent's Employee Harassment Policy preclude her from asserting that she has engaged in protected opposition under Section 704(a)? If this Court's pronouncement in *Suders* regarding the duty of employees to exercise reasonable means to avoid or minimize harm is to be anything other than a hollow platitude, the Petitioner should not be granted Title VII protection when she failed to come forward until summoned to do so in an internal investigation.

3. Protecting employees who ignore established reporting procedures may lead to less efficient and effective investigations by employers.

Any determination that employees can choose to ignore the internal reporting mechanisms created by the employer, and then assert they are nonetheless protected by Title VII's opposition clause because they merely provided answers to an employer's internal investigation or inquiry will generate a host of problems for employers, including public school districts. First and foremost, such a determination will create utter confusion. Public school boards routinely conduct investigations and inquiries into a wide range of matters, including, but not limited to, complaints of sexual harassment. On an annual basis, school boards are likely to conduct more harassment investigations than other employers, whether in the private or public sector, because, in addition to investigating claims of

employment harassment under Title VII, they have a responsibility to investigate complaints of sexual harassment against students arising under Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681 *et seq.* (2008).[5]

Many employers (including Respondent in the instant case) have implemented anti-harassment policies that set forth clearly defined reporting procedures, making it easier for employees to report harassment and simpler for the employer to determine whether a complaint has been made and by whom. The implementation of such policies goes a long way toward the elimination of workplace discrimination since, as this Court recognized in *Suders*, "[t]he employer is in the best position to know what remedial

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[5]As this Court recently held in *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 181-182, (2005) claims of retaliation are actionable under Title IX. In particular, this Court noted:

> If Title IX's private right of action does not encompass retaliation claims, the teacher would have no recourse if he were subsequently fired for speaking out. Without protection from retaliation, individuals who witness discrimination would likely not report it . . . .
>
> Title IX's enforcement scheme also depends on individual reporting because individuals and agencies may not bring suit under the statute unless the recipient has received "actual notice" of the discrimination.

544 U.S. at 180-181 (*citing Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 288, 289-290) (1998).

procedures it offers and how those procedures operate." *Suders*, 542 U.S. at 146 n. 7. If courts allow employees to ignore such procedures, and maintain opposition-based retaliation claims for merely answering questions posed during internal investigations, a school board may not always be able to accurately determine when a complaint has been made and who is a complainant, resulting in confusion as to whether its policies apply and possible failure by the employer to respond in an timely and effective manner to incidents of harassment "reported" during an investigation.

To be deemed protected activity under Section 704(a)'s opposition clause, the employee's statements to his employer must, at minimum, be sufficient to place the employer on notice that the employee is registering a complaint. *See Blount v. Glickman*, 1998 WL 325235 at *6 (N.D. Ill. 1998). As one district court has explained in determining whether an employee has engaged in protected opposition, "the relevant question . . .is not whether a formal accusation of discrimination is made, but whether the employee's communications to the employer sufficiently convey the employee's reasonable concerns that the employer has acted, or is acting in an unlawful manner." *Black v. Veatch Prichard, Inc.*, 155 F. Supp. 2d 1285, 1295 (D. Kan. 2001).

In addition to creating confusion and a burden upon the limited economic resources and staff of school boards, the NSBA also foresees another serious problem if individuals in Petitioner's position are permitted to assert and maintain retaliation claims under the opposition clause. Petitioner contends that "unequivocal

protection of witnesses and complainants in an employer's internal processes is essential if those mechanisms are to be effective in detecting and correcting sexual harassment and other violations of Title VII." Pet. Br. 31. Although at first blush, it might appear that interpreting Title VII to encompass individuals who do not actively and overtly initiate complaints or reports of harassment serves Congress' intended purpose of eradicating discrimination, such an interpretation may actually deter employers from thoroughly conducting internal investigations.

Petitioner's case is a classic example. The record does not reflect that any of the employees who caused Respondent to initiate its internal investigation ever identified Petitioner as someone who had experienced, or had knowledge of, Gene Hughes' alleged acts of sexual harassment. Instead, the employer, in an effort to be thorough and to correct any improper activity, summoned Petitioner to participate in its investigation. As a reward for its efforts, Respondent is now defending itself in a Title VII lawsuit.

Title VII does not mandate that employers implement internal reporting mechanisms and grievance procedures to prevent and correct harassment. Nor has any decision by this Court required that employers do so. Instead, as an incentive for employers to institute internal remedial mechanisms, this Court has created an affirmative defense that employers can sometimes take advantage of if they have in place procedures for preventing and correcting unlawful harassment. *Faragher*, 524 U.S. at 807-808; *Ellerth*, 524 U.S. at 764-765. So long as an employer provides a

reasonable internal procedure for preventing and correcting discrimination and an employee unreasonably fails to use that procedure (as was the case with Petitioner), then the employer may be afforded the opportunity to assert the affirmative defense. However, if Petitioner's interpretation of Title VII is given credence, employers will have little incentive to do more than the minimum required to achieve the affirmative defense. Indeed, employers will perceive an obvious disincentive to take more thorough remedial measures, for doing so may expose them to greater risk of civil liability.

Likewise, if employees who merely give information at their employer's request during internal investigations can assert retaliation claims under the opposition clause any time they anticipate the possibility of adverse action in their futures, then it is reasonably foreseeable that more than a few individuals will intentionally relate information to employers during internal investigations for the sole purpose of insulating themselves from such adverse action. Such a development would create a substantial impediment for school boards, and other employers. First, the information provided by such employees may be based on nothing more than suspicions, rumors, or utter fabrications. Employers already taxed with staffing and budgetary concerns will unnecessarily waste time and money exploring insignificant or dubious matters, the truth or falsity of which they may never be able to uncover. Second, as discussed in more detail in Section II, *infra*, employers who have legitimate grounds for terminating or disciplining employees with performance and/or disciplinary

problems, will face the prospect of civil litigation should they attempt to do so.

Such concerns militate against giving Section 704(a) the expansive interpretation Petitioner seeks. As more than a few federal courts have noted, employees bringing Title VII claims of unlawful retaliation are "generally granted less protection for opposition than participation in enforcement proceedings." *Booker v. Brown & Williamson Tobacco Co.*, 879 F.2d 1304, 1312 (6th Cir. 1989) (*citing Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998, 1006 (5th Cir. 1969)). *See also Anduze v. Florida Atlantic Univ.*, 151 Fed. Appx. 875, 878 (11th Cir. 2005), *cert. denied*, 126 S.Ct. 2865 (2006) (citing *Total Sys. Services*, 221 F. 3d at 1174, and stating that "[o]pposition Clause acts are viewed in the context of the ordinary business environment, and, thus, are given less protection than Participation Clause acts"); *Laughlin v. Metropolitan Wash. Airports Auth.*, 149 F.3d 253, 259 n. 4 (4th Cir. 1998); *Sawicki v. American Plastic Toys.*, 180 F. Supp. 2d 910, 915 (E.D. Mich. 2001); and *Minnis*, 162 F. Supp. 2d at 739. The rationale behind these decisions is the recognition that certain forms of opposition simply do not fall within the ambit of Section 704(a)'s protections. *See Booker*, 579 F.2d at 1312 (*citing Holden v. Owens-Illinois*, 793 F.2d 745, 751 (6th Cir.), *cert. denied*, 479 U.S. 1008 (1986). As the Sixth Circuit observed in *Booker*, in order to determine if an employee's acts warrant protection under the opposition clause of Section 704(a):

> Courts are required to "to balance the purpose of the Act to protect persons

> engaging reasonably in activities opposing . . . discrimination, against Congress' equally manifest desire not to tie the hands of employers in the objective selection and control of personnel . . . . The requirements of the job and the tolerable limits of conduct in a particular setting must be explored." *Hochstadt v. Worchester Foundation for Experimental Biology*, 545 F.2d 222, 231 (1st Cir. 1976); *see also Mozee v. Jeffboat, Inc.*, 746 F.2d 365, 374 (7th Cir. 1984).

Booker, 579 F.2d at 1312; *see also Sawicki*, 180 F. Supp. 2d at 916.

Employing this balancing test in the present case, it is apparent that Petitioner's cooperation with her employer's internal investigation was not a reasonable form of opposition clause activity. Moreover, for the reasons above, even if this Court were to conclude otherwise, allowing employees to assert they have protected status merely because they answered questions asked of them in internal investigations would seriously bind the hands of their employers with respect to the selection and control of personnel, and would, as a practical matter, elevate opposition clause activity to the same level as participation clause activity.

B. Protecting Employees Who Merely Cooperate in an Employer's Internal Investigation Under the Participation Clause in Section 704(a) Is Not Necessary to Advance Title VII's Purpose of Detecting and Eliminating Harassment and May Have the Opposite Effect

As an alternative to her opposition clause arguments, Petitioner contends that her disclosure, during the course of an internal investigative interview, of sexual harassment she allegedly endured constitutes participation in "an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a). However, thus far, no published court decision has ever reached such a conclusion. Quite the contrary, the only courts to consider the issue of whether an employee's involvement in an employer's internal investigation amounts to protected activity under Section 704(a)'s participation clause have uniformly rejected that notion. *See Abbott v. Crown Motor Co.*, 348 F.3d 537, 543 (6th Cir. 2003); *E.E.O.C. v. Total Sys. Services*, 221 F. 3d 1171, 1174 (11th Cir. 2000); *Brower v. Runyon*, 178 F.3d 1002, 1005-1006 (8th Cir. 1999); and *Vasconcelos v. Meese*, 907 F.2d 111, 113 (9th Cir. 1990).

In each of these cases, the respective courts expressly concluded that the protections of Title VII's participation clause are limited to investigations flowing from the filing of a formal charge with the EEOC. As succinctly stated by the Court of Appeals for the Eleventh Circuit:

> The participation clause covers participation in "an investigation under . . . this subchapter," that is, an investigation under subchapter VI of Chapter 21 of Title 42 (42 U.S.C. §§ 2000e-2000e-17). 42 U.S.C. § 2000e-3(a). This clause protects proceedings and activities which occur in conjunction with or after the filing of a formal charge with the EEOC; it does not include participating in an employer's internal, in-house investigation, conducted apart from a formal charge with the EEOC.

Total Sys. Services, 221 F.3d at 1174.

Petitioner contends that because an employer's internal investigations serve Congress' goal of encouraging voluntary compliance with Title VII, then, *a fortiori*, it must be concluded that such internal investigations by employers are encompassed by the participation clause. Pet. Br. 22-23. However, this contention wholly ignores the fact that the plain text of Title VII does not *require* an employer to conduct internal investigations in the first place. As set forth above, this Court has recognized that an employer's implementation of remedial mechanisms is not mandatory, and to encourage adoption of such voluntary measures, the Court has provided employers an incentive to do so through the creation of an affirmative defense in certain kinds of harassment cases. *Faragher*, 524 U.S. at 807-808; *Ellerth*, 524 U.S. at 764-765. An employer's voluntary internal investigation stands

in stark contrast to the statutorily mandated investigations conducted by the EEOC pursuant to the express terms of Title VII. *Cf.* 42 U.S.C. § 2000e-5(b) (stating that the EEOC will investigate charges of discrimination filed with it).

In her brief, Petitioner also asserts that "[u]nequivocal protection of witnesses and complainants in an employer's internal processes is essential if those mechanisms are to be effective in detecting and correcting sexual harassment and other violations of Title VII." Pet. Br. 31. According to Petitioner, "the abusive official can be confident that any anti-retaliation litigation will be dismissed—as occurred in the instant case—without inquiry into whether the asserted retaliation occurred." *Id.* at 30. Essentially, Petitioner is saying that employers cannot be trusted to combat employment discrimination and retaliation in their workplaces absent being required to do so by law.

Such an assertion is not only offensive, but entirely baseless as well. As noted above, many employers throughout the nation, including school boards, have adopted anti-harassment and anti-discrimination policies and provide training to implement these policies out of a concern for the well-being of their staffs and the knowledge of the toll that unlawful discrimination can have on the productivity and morale of their workforces. *See, e.g., Harper v. City of Jackson Municipal Sch. Dist.*, 149 Fed. Appx. 295, 300 (5th Cir. 2005)(holding that school district's written harassment policy and response to the plaintiff's complaint was "reasonable and vigorous"); *Bryant v. School Bd. of Miami Dade County*, 142 Fed. Appx. 382, 385 (11th Cir. 2005)(holding that school board was not liable for

sexual harassment under Title VII where it "posted its sexual harassment policy quite extensively"). Many, if not most, of these employers had such policies in place prior to this Court's creation of the aforementioned affirmative defense. *See, e.g., Redman v. Lima City Sch. Dist. Bd. of Educ.*, 889 F. Supp. 288, 294 (N.D. Ohio 1995)(holding that school district was not liable under Title VII based on its effective response to sexual harassment complaint pursuant to its policy). NSBA submits that this reality, coupled with the fact that employers are not required by law to implement such policies, is compelling proof that most employers are not motivated to engage in or tolerate conduct that violates Title VII.

Pursuant to these internal policies, school districts routinely conduct investigations after receiving complaints of unlawful conduct and have every incentive to ensure such investigations are thorough and fair and result in appropriate consequences for those who have violated school policies and federal and state laws prohibiting workplace discrimination. Beyond avoiding liability for failing to effectively respond to harassment and discrimination, school districts' important roles in their communities provide an added incentive to conduct investigations fairly and not to retaliate against employees who respond to an investigator's questions. School districts cannot afford to engage in retaliatory actions that would give them the reputation in their communities for operating schools where perpetrators of harassment and discrimination are tolerated and those who dare to provide information against such offenders are disciplined or terminated. Communities rightfully

expect and demand that school districts provide staff and students with environments that are safe, secure, orderly and conducive to effective instruction and learning. In the absence of such environments, school districts, which often struggle to fill positions such as superintendents, math and science teachers, and special education teachers, would find it even more difficult to hire and retain the qualified staff essential to carrying out their educational mission.

As aptly noted by the Sixth Circuit in the case below, strong policy arguments exist that discourage expanding the scope of the participation clause to encompass employee cooperation in internal investigations:

> The impact of Title VII on an employer can be onerous. By protecting only participation in investigations that occur relative to EEOC proceedings, the participation clause prevents the burden of Title VII from falling on an employer who proactively chooses to launch an internal investigation. Expanding the purview of the participation clause to cover such investigations would simultaneously discourage them. We will not alter this limit delineated by the language of Title VII and recognized by this court and others.

Crawford v. Metropolitan Gov't of Nashville and Davidson County, 211 Fed. Appx. 373, 377 (6th Cir. 2006). The onerous impact of Title VII is no less

acute on school boards across the nation, that routinely conduct investigations into alleged violations of the statute.

The facts of Petitioner's case illustrate all too well how school boards might become discouraged from being proactive and conducting internal investigations in the absence of an EEOC charge if the protection Petitioner seeks is afforded to her. In this case, the superintendent of schools made the recommendation to Respondent to terminate Petitioner. Resp't Br. 6. However, he did so based on the legitimate, nondiscriminatory grounds that Petitioner had engaged in acts of embezzlement and drug use. *Id.* at 8 n.12. Although the superintendent did view a final report of the investigation in which Petitioner was interviewed, it only contained a summary of the information gathered and for confidentiality reasons did not either identify Petitioner by name, or otherwise attribute any specific statements to Petitioner. *Id.* Hence, it is illogical to conclude that the superintendent's recommendation to terminate Petitioner was in any way related to her involvement in Respondent's internal investigation.

Many school boards across the country, like Respondent, provide similar confidentiality in investigating harassment and use similar discipline and termination processes that make extending Title VII protection to those employees who merely cooperate in an internal investigation particularly troublesome. In many districts, the school board terminates employees based on the recommendation of administrators. The school board is not involved in the day-to-day operations of the school district and is not involved in the routine investigation and

decision-making process related to dealing with sexual harassment and discrimination complaints unless an aggrieved employee specifically brings the matter to the school board's attention. Thus, when a school board terminates an employee, it is unlikely to know whether that employee participated in a sexual harassment investigation.

Likewise, the administrator recommending the termination to the school board and the employee's immediate supervisor (who may have made the initial termination recommendation to the administrator) are likely to have no idea the employee participated in a sexual harassment investigation or what the employee said in the investigation for two reasons. First, except in very small school districts, neither the administrator recommending the termination nor the employee's immediate supervisor is likely to have conducted the sexual harassment investigation in most circumstances. Second, school district sexual harassment procedures commonly protect the confidentiality of employees who participate in investigations to encourage employees to speak candidly. Thus, most individuals in a school district responsible for recommending termination of employees are unlikely to know any particular employee participated in an internal sexual harassment investigation unrelated to the proposed termination, much less the content of that employee's statements. As a result, the immediate supervisor, the recommending administrator, and the final decisionmaker, usually the board of education, are all unlikely to have received information that would enable discharging or

disciplining an employee in retaliation for cooperating in a harassment investigation.

NSBA is equally concerned that any ruling by this Court that employees who are involved in internal investigations are automatically protected by Title VII's participation clause will do serious damage to the "business judgment rule." It is well settled that the role of the court is not to "sit as a super-personnel department that reexamines an entity's business decisions . . . ." *See Wilking v. County of Ramsey*, 153 F.3d 869, 873 (8th Cir. 1998); *see also Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991). However, if Petitioner's interpretation of Title VII is adopted, every adverse action a school board takes against any employee who has ever been involved to any degree in an internal investigation will be subject to a Title VII claim for retaliation. Surely this was not Congress' intent when it enacted Title VII. Such a ruling would only serve to "tie the hands of employers in the objective selection and control of personnel . . . ." *Booker*, 579 F.2d at 1312.

Additionally, in their briefs, both Petitioner and the National Employment Lawyers Association ("NELA") lament that unless Section 704(a)'s protections are extended to employees who are summoned to give interviews in internal investigations conducted by their employers, the EEOC will be inundated by prophylactic charges of discrimination. Pet. Br. 39; NELA Br. 23. This argument fails for three reasons. First, such an argument flatly contradicts historical experience. Since the EEOC was created by the passage of Title VII, employers have long been conducting internal investigations. At no time has this Court or any

other court held that Section 704(a)'s protections apply to mere cooperation in an internal investigation, prior to the filing of an EEOC charge. Yet NSBA is not aware of any "deluge of pre-emptive charges" filed by cooperating witnesses with the EEOC at any point in history. If such an avalanche of prophylactic charges has never occurred up to this point, why would such an event happen now simply because the Court declines to expand Title VII as Petitioner desires?

Second, as already explained above, the vast majority of employees giving information in such internal investigations will have no rational basis for fearing retaliation from their employers. However, for those employees who do, the easiest and simplest way for them to protect themselves would be to clearly and affirmatively register an internal complaint or report their opposition to practices made unlawful by Title VII. In such a circumstance, the employee would be shielded from future adverse action by Section 704(a)'s opposition clause. This is what Congress intended when it created Section 704(a), and had Petitioner made such an internal complaint herself, the courts below would have determined that she engaged in protected activity.

Finally, this argument ignores the real possibility that granting employees Title VII protection for participating in an employee's internal investigation will discourage employers from pursuing internal investigations, which could just as plausibly lead to the same negative result—more cases being filed with the EEOC. If employers know that every employee they ask questions of in an internal investigation regardless of what they

say (truthful or untruthful, relevant or irrelevant) will be given Title VII protection, an employer's incentive to conduct an internal investigation will be reduced. Employer incentives to conduct internal investigations will be particularly low if the employer knows it will have to interview marginal employees that may have relevant information about the case. Instead of spreading a wide blanket of anti-retaliation protection, the employer may instead tell the complaining employee to take her case to the EEOC.

II. PETITIONER'S OVERLY BROAD INTERPRETATION OF TITLE VII'S RETALIATION PROVISION WILL SEVERELY IMPACT AMERICA'S ALREADY OVERBURDENED PUBLIC SCHOOL SYSTEM.

NSBA and its members are dedicated to ensuring excellence and equity in America's public education system. However, unlike private educational entities, public school districts must rely on limited governmental resources to achieve their mission. These resources must be carefully allocated to pay for, *inter alia*, the following: safe and adequate facilities for educating students; quality instructional materials and programs; competitive compensation to attract qualified teachers and staff; and other operating expenses necessary for maintaining quality schools. Like all employers, public school districts must also incur the significant legal expenses associated with defending against lawsuits that are brought by their employees, with such expenses frequently being

unrecoverable even when the school district prevails in the litigation. However, in contrast to other employers, these expenses are in addition to the litigation costs already borne by school districts for lawsuits which may be initiated by students, parents or other members of the public.

Although NSBA and its members respect the various state and federal laws that apply to them, and understand that individuals whose legal rights have been violated should be able to seek redress, they also expect the legal system to recognize the drastic impact on a school district's resources when statutory rights are unjustifiably expanded in a way that increases the potential for excessive and costly litigation. As shown above, Petitioner's interpretation of the anti-retaliation provisions of Title VII—that mere passive cooperation in an employer's internal investigation constitutes protected activity—goes beyond the intent of Congress and upsets the balance between individual rights and the employer's ability to manage its workplace without court intervention. As this Court has noted, the "displacement of managerial discretion by judicial supervision finds no support in the Court's precedents." *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

Under Petitioner's view, school district employees with no desire to engage in protected activity under Title VII, and who are culpable for misconduct or poor performance, could invoke the protections of Title VII as a form of job insurance simply because that employee answered questions during an investigation of an alleged unlawful employment practice. "Title VII, like the ADA, is not a job insurance policy." *Prendergast v. A. Sulka*

& *Co.*, 1996 WL 617079, *12 (N.D. Ill. 1996) (*citing Hedberg v. Indiana Bell Telephone Co.*, 47 F. 3d 928, 934 (7th Cir. 1995)). Such a scenario would raise the specter of expensive litigation and force school districts into a Hobson's choice: settle with the undeserving employee to avoid a meritless lawsuit, or expend resources to defend the meritless lawsuit. *See, e.g., Auguster v. Vermilion Parish Sch. Bd.*, 249 F. 3d 400, 404 (5th Cir. 2001)(affirming grant of summary judgment against elementary school teacher on Title VII discrimination claim, where teacher was terminated for poor performance); *Pipkin v. Bridgeport Bd. of Educ.*, 159 Fed. Appx. 259 (2d Cir. 2005)(affirming summary judgment against teacher raising Title VII and ADEA discrimination claims where teacher demonstrated poor performance); *Johnson v. Atlanta Indep. Sch. Sys.*, 137 Fed. Appx. 311, 314 (11th Cir. 2005)(affirming summary judgment for school district on claims of discrimination, retaliation and violation of due process asserted by teacher with a "documented history of performance deficiencies"). As an unavoidable consequence, the limited public resources utilized by public school districts will be compromised, and the ability to provide a quality education will suffer.

Even more important than the financial ramifications is the impact that Petitioner's view of Title VII will have on the practical ability of public school districts to achieve their mission. NSBA member school districts must carefully manage teachers, administrators and staff to ensure that their employees create an educational environment that is safe, effective, and conducive to learning. *Henerey ex rel. Henerey v. City of St. Charles, Sch.*

Dist., 200 F. 3d 1128, 1135 (8th Cir. 1999)("School districts have an interest in maintaining decorum and in preventing the creation of an environment in which learning might be impeded . . .."). In addition, unlike most private sector employers, public school districts must, in their supervision of personnel, navigate through a myriad of additional employee protections guaranteed through collective bargaining agreements, constitutional requirements and specific state statutes that create job security. School employees have a panoply of remedies at their disposal to challenge adverse personnel determinations. Some of these remedies allow employees to challenge acts of alleged discrimination and retaliation (i.e., anti-discrimination provisions in a collective bargaining agreement, First Amendment association claims under 42 U.S.C. § 1983, and state laws that prohibit discrimination against school district employees),[6] and on other grounds that are not tied to discrimination in the workplace (i.e., teacher tenure statutes). *See, e.g., City Sch. Dist., Peekskill v. Peekskill Faculty Ass'n*, 398 N.Y.S.2d 693, 695 (N.Y. App. Div. 1977)(holding that teacher's claim for retaliation based on exercise of statutorily protected rights was subject to arbitration under collective

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[6] *See, e.g., Marshall v. Allen*, 984 F. 2d 787, 798 (7th Cir. 1993) (employee who intentionally associated with female employees who alleged sex discrimination allowed to proceed with association claim because the protest involved matter of public concern); Florida Education Equity Act (prohibiting, *inter alia*, "discrimination on the basis of race, ethnicity, national origin, gender, disability, or marital status against a student or an employee in the state system of public K-20 education.. .") Fla. Stat. § 1000.05(2)(a) (2008)

bargaining agreement, as such action would not be a "just cause" dismissal); *Jefferson v. Jefferson County Pub. Sch. Sys.*, 360 F. 3d 583, 587 (6th Cir. 2004)(holding that collective bargaining agreement between the teachers' union and school board created constitutional due process property interest in employment); *Glanville v. Hickory County Reorg. Sch. Dist. No. I*, 637 S.W.2d 328, 331 (Mo. Ct. App. 1982)(holding that teacher tenure statute prohibited adverse action taken in retaliation for exercising free speech rights); Ark. Code Ann. § 6-17-1503 *et seq.* (allowing teacher dismissal only for "just and reasonable cause" based on legislative finding that teachers needed additional job protection beyond prohibition against "arbitrary, capricious, or discriminatory" dismissals); Wis. Stat. § 118.20(1) (prohibiting discrimination against teachers on the basis of sex, race and other factors).

Petitioner's unnecessarily broad interpretation of what constitutes protected activity under Title VII will add an additional and unjustified burden on every public school district's ability to manage its employees: the ability of public school districts to remove underperforming personnel will be undermined, and the quality of education in our schools will suffer.

Both before and after the enactment of Title VII, employers have by and large effectively utilized their internal policies and procedures to investigate allegations of misconduct prior to any court or agency intervention. If it was necessary to make such internal investigations subject to court supervision, as Petitioner would have the Court hold, then Congress would have remedied the problem by making it clear that employees who

merely cooperate in internal investigations fall within the coverage of Title VII. By comparison, in enacting the Americans with Disabilities Act, 42 U.S.C. § 12112 *et seq.* (2008) ("ADA"), Congress expressly included a more expansive form of protection for individuals who claim to have been retaliated against based upon their mere passive involvement with alleged victims of discrimination. *Id.* at § 12112(b)(4) (prohibiting employer from discriminating against an individual because of her association with a qualified individual with a disability). The ADA not only includes express protection for those who associate with individuals protected by the ADA, but, also contains an anti-retaliation provision that is more expansive than Title VII. Section 12203(b) of the ADA contains the same type of opposition clause and participation clauses as Title VII, but goes on to protect those who simply exercise their rights under the ADA or who assist others in doing so. *Id.* at § 12203(b). No such provision exists in Title VII.

To avoid the negative impact that Petitioner's view would have on the provision of quality public education in this country, NSBA urges this Court to hold that mere passive involvement in an employer's internal investigation, prior to the initiation of an administrative investigation by the Equal Employment Opportunity Commission, is not "opposition" or "participation" under Section 704(a) of Title VII.

CONCLUSION

For all of the above reasons, the National School Boards Association as *Amicus Curiae*,

respectfully requests that this Honorable Court affirm the Sixth Circuit's decision in all respects.

Respectfully submitted,

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IN THE

Supreme Court of the United States

VICKY S. CRAWFORD,
Petitioner,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE NATIONAL WOMEN'S LAW CENTER ET AL. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does the anti-retaliation provision of section 704(a) of Title VII of the 1964 Civil Rights Act protect a worker from being dismissed because she cooperated with her employer's internal investigation of sexual harassment?

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INTEREST OF THE AMICI CURIAE

The National Women's Law Center (NWLC) is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's legal rights. Since 1972, NWLC has worked to secure equal opportunity for women in the workplace, which includes the right to a workplace that is free from sexual harassment and to protection from retaliation. NWLC has prepared or participated in the preparation of numerous amicus briefs in cases involving sex discrimination in employment before this Court.[1] It is joined in filing this brief by 31 organizations that share a longstanding commitment to civil rights and equality in the workplace for all Americans. The individual organizations are described in the attached appendix.

STATEMENT OF FACTS

Vicky Crawford was fired after a successful thirty-year career with the Metropolitan Government of Nashville and Davidson County, Tennessee (collectively referred to here as "Metro") within months of giving evidence about sexual harassment by a senior manager in an employer-initiated investigation of his conduct.

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

Early in 2002, an attorney at the Metro Legal Department learned that several female employees had expressed concern about being sexually harassed by Dr. Gene Hughes, the employee relations director for the Metro School District. Dr. Hughes was one of the highest ranking officials in the school district, and had been personally selected by the Director of the School District. Responsibility for investigating the allegations went to Veronica Frazier, the assistant director for the county human resources department.

Ms. Frazier started her investigation by calling to her office those employees who had worked directly with Dr. Hughes. In the course of Ms. Frazier's interviews with these employees, three women, including Vicky Crawford, described serious incidents of sexual harassment by the employee relations director. Ms. Crawford's statements to the investigator described Dr. Hughes' "numerous" requests to see her breasts; detailed how, in response to a friendly "what's up?" from her, he grabbed his crotch and said "you know what's up"; explained that on several occasions he pressed his crotch against the window of her office; and revealed that on one occasion, when he had come in to her office and she asked what she could do for him, he grabbed her head and pulled it toward his lap. Pet. App. 5A n.1. JA 12, 16-19, 23.

The investigator's report left the allegations of sexual harassment made by Ms. Crawford and the other two women who participated in the investigation unresolved. Because Dr. Hughes denied all of the allegations of harassment, and there were no witnesses to the incidents, the report repeatedly noted

that "[f]act finders could not confirm the complainant's statements. . . . and there are no witnesses to corroborate the witness' claim." Br. Opp. App. 15-16. While the report concluded that Dr. Hughes had acted inappropriately to some extent, no disciplinary action of any sort was taken against him.

Instead, the disciplinary action that was taken was the dismissal of all three witnesses who had offered evidence of sexual harassment. During the investigation, Ms. Crawford expressed her fear that because Dr. Hughes was in a position of authority and was a good friend of the Director of the School District, she was going to lose her job for providing information about his misconduct. Indeed, the reason she had not herself reported the harassment earlier was because Dr. Hughes was the head of employee relations, which was where an employee would normally report any such charge. JA 20. Ms. Crawford's fears were warranted. Within a month of the investigator's report being finalized, Ms. Crawford herself was placed under investigation by her employer. She was fired, on charges that she alleged to be false, just months after she participated in Metro's investigation of Dr. Hughes. Pet. App. 5a.

Ms. Crawford sued her former employer, charging that firing her within months of her participation in its investigation of the employee relations director's alleged sexual harassment constituted illegal retaliation under Title VII of the Civil Rights Act of 1964.[2] The Sixth Circuit,

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[2] Section 704(a) of Title VII protects an employee from retaliation because "he has opposed any practice made an unlawful employment practice by this title, or because he has

affirming a grant of summary judgment, concluded that Ms. Crawford's statements about the sexually inappropriate conduct engaged in by the employee relations director did not constitute "opposition" to illegal conduct that is protected by Title VII. The court also found that Ms. Crawford had no protection against retaliation for "participation" in her employer's internal investigation because the investigation occurred before any charge of discrimination had been filed with the Equal Employment Opportunity Commission (EEOC).

SUMMARY OF ARGUMENT

To be effective, Title VII's prohibition against retaliation must protect employees like Vicky Crawford who participate in their employers' internal investigations of sexual harassment and other discrimination. This protection—under both the "participation" and the "opposition" clauses of the statute's anti-retaliation provision—is of particular importance in the context of sexual harassment. Social science research reveals that sexual harassment is underreported as a result of the fear of retaliation, and that the costs of harassment to its victims and to the organizations that employ them are exacerbated by the consequences of underreporting.

Sexual harassment is an insidious, pervasive and still widespread problem that interferes with women's right to participate fully in working life.

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made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title." 42 U.S.C. § 2000e-3.

The effects of sexual harassment on women's work are significant. Numerous studies have shown that as many as 1 in 10 women may leave a job as a result of sexual harassment. *See* Barbara A. Gutek & Mary P. Koss, *Changed Women and Changed Organizations: Consequences of and Coping with Sexual Harassment*, 42 J. Vocational Behavior 28, 31-32 (1993) (hereinafter "*Changed Women and Changed Organizations*"). Sexual harassment lowers women's self-confidence and erodes their commitment to the organizations in which they work. Moreover, the intense negative impact of harassment on women's physical and mental health goes far beyond the workplace.

Social science research has extensively documented these negative effects and has also revealed that women face tremendous pressure not to report workplace harassment. The fear of retaliation for reporting, substantiated by the reality that employers often do retaliate, is the largest source of pressure not to report harassment either internally or externally. Moreover, the research also demonstrates that women are more likely to report sexually inappropriate behavior or to take other overt steps to challenge the behavior in an environment that tolerates neither the harassment itself nor retaliation for its reporting. Without reporting, the chances of ending the widespread harm of harassment are minimal. As this Court recently observed, "Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses." *Burlington Northern & Santa Fe Ry. v. White*, 126 S. Ct. 2405 , 2414 (2006). The Sixth Circuit's decision

sends a clear and troubling message to all sexual harassment victims that their fear of retaliation is warranted, and thereby discourages reporting of misconduct. Under the rule established by the lower court's decision, sexual harassment will continue and women will continue to suffer the consequences.

When this Court established the affirmative defense for hostile work environment harassment in *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. Boca Raton*, 524 U.S. 775 (1998), it emphasized the significance of the law's role in preventing and eradicating discrimination, not simply in providing an avenue for litigation once the discrimination has occurred. The affirmative defense emphasized the employer's responsibility to act to deter harassment as well as the employee's responsibility to take advantage of internal employer mechanisms for addressing harassment. The Sixth Circuit's rule, by providing no protection against retaliation for employees who participate in their employers' internal processes and who thus oppose sexual harassment in the workplace, undermines any effective mechanism for internal resolution of harassment.

The decision below should be reversed, both because the plain language of Title VII protects Ms. Crawford's conduct, *see* Brief for Petitioner and the other *amicus* briefs filed in this case, and because, as discussed herein, the Sixth Circuit's holding completely undermines the purpose of the anti-retaliation provisions. This Court should definitively establish that petitioner's conduct is protected under the anti-retaliation provision of Title VII both

because she participated in an investigation and because she opposed an unlawful employment practice.

ARGUMENT

I. Sexual Harassment is Pervasive and Costly

Sexual harassment is "one of the most damaging barriers to career success and satisfaction for women." Chelsea R. Willness et al, *A Meta-Analysis of the Antecedents and Consequences of Workplace Sexual Harassment*, 60 Personnel Psychology 127, 127 (2007) (hereinafter "*The Antecedents and Consequences of Workplace Harassment*"). While estimates of the pervasiveness of harassment vary, most suggest that more than half of women in the United States face some form of workplace sexual harassment. *Id.* at 128.[3]

Women targeted by harassment pay a significant price psychologically, physically, and economically. That "price comes in many forms, from job loss and lowered productivity, to health effects such as sleeplessness, anxiety, depression and lowered satisfaction with one's job and one's life." Beth A. Quinn, *The Paradox of Complaining: Law, Humor and Harassment in the Everyday Work World*, 25 Law & Soc. Inquiry 1151, 1154 (2000) (hereinafter

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[3] While this brief focuses on sexual harassment, the harm done by race, age and other forms of discrimination and harassment is also enormous. Moreover, similar fears of retaliation and social pressure not to identify experiences as discrimination lead to underreporting across the spectrum of discriminatory conduct.

"*The Paradox of Complaining*"). *See also* Caroline Vaile Wright & Louise F. Fitzgerald, *Angry and Afraid: Women's Appraisal of Sexual Harassment During Litigation*, 31 Psychol. Women Q. 73, 73 (2007) (hereinafter "*Angry and Afraid*"). Studies have shown that harassment, "even at relatively low frequencies, exerts a significant negative impact on women's psychological well-being and, particularly, job attitudes and work behaviors." Kimberly Schneider et al., *Job-Related and Psychological Effects of Sexual Harassment in the Workplace: Empirical Evidence from Two Organizations*, 82 J. Applied Psychol. 401, 412 (1997) (hereinafter "*Job-Related and Psychological Effects of Sexual Harassment*"). In fact, even women who do not identify the sexually explicit conduct they confront at work as "harassment" report negative psychological effects as a result of the conduct. *Id.* at 413.

Sexual harassment decreases job satisfaction and commitment to the organization. It reduces morale and productivity, interferes with interpersonal workplace relationships, and increases absenteeism and other forms of escape from the workplace. *The Antecedents and Consequences of Workplace Harassment*, at 145-49. Sexual harassment thus not only harms employees, but also creates substantial costs for employers. Indeed, studies of employer costs suggest that companies have lost hundreds of millions of dollars in loss of productivity—both individual and group—and in absenteeism and retraining. Organizations further face litigation expenses, bad publicity, and negative effects on recruiting and retention in the wake of harassment. *The Antecedents and Consequences of Workplace*

Sexual Harassment, at 127. Some studies report that as many as one in 10 women will leave a job because of sexual harassment. *See Changed Women and Changed Organizations*, at 31-32.

More subtle costs are at least as significant. A widely cited set of studies done by the U.S. Merit Systems Protection Board found that thousands of female federal employees had experienced negative emotional and physical symptoms as a result of sexual harassment. U.S. Merit Systems Protection Board, *Sexual Harassment of Federal Workers: Is it a Problem?*, Washington D.C., U.S. Government Printing Office (1981) (hereinafter "*Sexual Harassment of Federal Workers*"); U.S. Merit Systems Protection Board, *Sexual Harassment of Federal Workers: An Update*, Washington D.C., U.S. Government Printing Office (1987) (hereinafter "*Sexual Harassment of Federal Workers: An Update*"). Other studies have found a wide range of psychological injury to victims of sexual harassment, with some finding harm so significant that victims showed symptoms of Post-Traumatic Stress Disorder (PTSD). *The Antecedents and Consequences of Workplace Sexual Harassment*, at 149 (reviewing several studies).

II. Sexual Harassment is Significantly Underreported

Despite the harmful impact harassment has on so many women, research shows that "most harassment targets do not report their experiences." Mindy E. Bergman, Lilia M. Cortina & Louise F. Fitzgerald, *The (Un)reasonableness of Reporting: Antecedents and Consequences of Reporting Sexual Harassment.*

87 J. Applied Psychol. 230, 230 (2002) (hereinafter "*The (Un)reasonableness of Reporting*"). In fact, the most infrequent response to harassment in all of these studies is to seek relief from one's employer. *See, e.g.*, Louise F. Fitzgerald et al., *Why Didn't She Just Report Him?: The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 J. Soc. Issues 117, 121 (1995) (hereinafter "*Why Didn't She Just Report Him?*"). And, among those sexual harassment targets who do turn to their employers for support, they most commonly use less formal mechanisms within the workplace. *Id.* Women least often respond to harassment by taking any kind of formal or legal action. *Id.*

Instead, researchers have identified a wide range of informal and individual coping strategies that women use to try to manage the events and their consequent emotional and psychological effects. Many women faced with harassment will "simply tolerat[e] the harassment, denying that it is happening or that it has any effect," *Job-Related and Psychological Effects of Sexual Harassment*, at 404. Others respond by ignoring the behavior or trying to manage it through indirect comments. Some interpret the conduct as "horseplay" or "playing around" in order to characterize it as something other than harassment. *Changed Women and Changed Organizations*, at 37-38. *See also The Paradox of Complaining*, at 1167-74 (describing how women try to "not take it personal" in order to avoid direct confrontation of sexual harassment). One of the most frequent responses from targets of harassment is simply to try to avoid the harasser.

See, e.g., Why Didn't She Just Report Him?, at 119-120. In fact, research consistently demonstrates "that women avoid their harassers at far greater rates than they confront." Vicki J. Magley, *Coping with Sexual Harassment: Reconceptualizing Women's Resistance*, 83 J. Personality & Soc. Psychol. 930, 943 (2002). *See also* Caroline Cochran, Patricia A. Frazier & Andrea M. Olson, *Predictors of Responses to Unwanted Sexual Attention*, 21 Psychol. Women Q. 207, 222-24 (1997) (study demonstrating that avoiding the harasser is one of the most typical responses to harassment).

While research into victim response consistently reveals these patterns, those who study reactions to sexual harassment also report that "[t]he question most commonly asked concerning victim response is, 'Why didn't she just report him?'" *Why Didn't She Just Report Him?*, at 122. The explanations that harassment targets offer for their decision not to take formal action against misconduct are varied: some believe that "nothing can or will be done and many are reluctant to cause problems for the harasser. The most common reason, however, is fear—fear of retaliation, of not being believed, or hurting one's career, or of being shamed and humiliated." *Id. See also Changed Women and Changed Organizations*, at 39.

Ultimately, women's assessments of whether to confront harassment directly and formally, or to use personal and individual coping mechanisms "rest on a careful balancing of the costs and benefits of doing so." Deborah A. Brake, *Retaliation*, 90 Minn. L. Rev. 18, 36 (2005) (hereinafter "*Retaliation*"). *See also*

Deborah E. Knapp, et al., *Determinants of Target Responses to Sexual Harassment: A Conceptual Framework*, 22 Acad. Mgmt. Rev. 687, 700 (1997) (hereinafter "*Determinants of Target Responses to Sexual Harassment*"). The pressures not to use formal mechanisms are considerable—the personal costs of doing so range from direct retaliation in the form of job loss to social stigma and loss of self-esteem. The benefits are often unclear, and are very dependent on the organizational climate within which the harassment victim is assessing her options.

A. Women Face—and Thus Reasonably Fear—Retaliation for Calling Attention to Harassment

Fear of retaliation is the most significant barrier to reporting sexual harassment on the job. Numerous studies report that women fear that complaining about harassment will make things worse for them at work, and, in fact, studies also show that this fear is well-founded. In many organizations, reporting harassment leads to retaliation. Vicky Crawford's story is a case in point.

In the social science literature, "[s]tudies of victims consistently report that fear of personal or organizational retaliation is the major constraint on assertive responding." *Why Didn't She Just Report Him?*, at 127. *See also* Cheryl R. Kaiser & Carol T. Miller, *Stop Complaining! The Social Costs of Making Attributions to Discrimination*, 27 Personality and Social Psychol. Bull. 254, 255 (2001) (hereinafter *"Stop Complaining!"*) ("The most

commonly documented barrier to confronting discrimination is interpersonal costs, such as being perceived as a troublemaker or experiencing retaliation.") Specifically, one study found that about 70 percent of sexual harassment victims who choose not to file claims of discrimination cite a fear of retaliation as a "moderate or strong influence on their decision." Ellen R. Pierce, Benson Rosen & Tammy Bunn Hiller, *Breaking the Silence: Creating User-Friendly Sexual Harassment Policies*, 10 Emp. Resps. & Rts. J. 225-233 tbl.II (1997). In a study done by the U.S. Merit Systems Protection Board, 29 percent of employees who had experienced incidents of sexual harassment did not report them because of fear that it would make circumstances at work more unpleasant and 17 percent did not report because they believed it would adversely affect their careers. *Sexual Harassment of Federal Employees: An Update.*

Other studies document that this fear of retaliation is well-founded. For example, in one study, 62 percent of state workers "reported retaliation for their responses to harassment, including lowered job evaluations, denial of promotion and being transferred or fired—and the most assertive responses often incurred the greatest costs." *Why Didn't She Just Report Him?*, at 122-123 (describing the study conducted in P.H. Loy & L.P. Stewart, *The Extent and Effects of Sexual Harassment of Working Women*, 17 Sociological Focus 31-43 (1984)). Another found that 41 percent of victims who file formal claims about on-the-job harassment report that the claim filing made things

worse at work. *Sexual Harassment of Federal Workers,* at 13-14.[4]

B. Social and Emotional Costs Further Pressure Victims and Witnesses to Remain Silent

Reporting harassment or addressing it through other formal or confrontational means presents risks short of retaliation but similarly destructive for women at work. Employees who speak out about discrimination face strong social stigma. Identifying oneself as a target of discrimination negatively affects self-esteem and tends to earn the target the label of complainer or troublemaker. Thus, some of the social science research actually suggests that "assertive coping responses at best have little substantive impact; at worst, they appear to increase damage to the target's job, psychological, and health status." *The (Un)reasonableness of Reporting,* at 230. *See also* Theresa M. Beiner, *Gender Myths v. Working Realities: Using Social Science to Reformulate Sexual Harassment Law* 164-65 (2005).

Studies reveal that individuals who complain about discrimination are perceived as troublemakers. *See, e.g.*, Cheryl R. Kaiser & Brenda Major, *A Social Psychological Perspective on Perceiving and*

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[4] The EEOC's most recent data on charge filings also show the frequency with which retaliation follows formal complaints of harassment and other discrimination. The number of retaliation charges has increased markedly in recent years, making up almost a third of the charges filed with the EEOC in 2007. *See* Equal Employment Opportunity Commission, http://www.eeoc.gov/stats/enforcement.html. These data bear out the concern that those who do come forward to challenge discrimination face retaliation.

Reporting Discrimination, 31 Law & Soc. Inquiry 801, 818-819 (2006). A claim of discrimination brings significant negative social consequences. In particular, one study found that when a person complained about discrimination, "[r]egardless of how much discrimination the stigmatized person faced, he was rated as more hypersensitive, emotional, argumentative, irritating, trouble making and complaining when he attributed his failure to discrimination." *Stop Complaining!*, at 261.

Faced with this type of response, it is not surprising that working women often show reluctance to confront sexist conduct directly. Several psychological studies have explored this phenomenon and have shown that women have a keen awareness of how personally and socially costly it could be to respond formally or openly to discrimination. See J. Nicole Shelton & Rebecca E. Stewart, *Confronting the Perpetrators of Prejudice: The Inhibitory Effects of Social Costs*, 28 Psychol. Women Q. 215 (2004) (study of how perceived social costs of reporting affect women's decisions about whether to report harassment); Julie A. Woodzicka & Marianne LaFrance, *Real Versus Imagined Gender Harassment*, 57 J. Soc. Issues 15, 20-21 (2001); *What Did you Just Say?!*, at 85-86 (reporting results of a study showing that women are constrained in their responses to sexist remarks by awareness of social pressures and costs).

The costs of identifying as a victim of sexual harassment are not only external. The research demonstrates that "stigmatized people are often unwilling to make discrimination attributions." *Stop*

Complaining!, at 254. *See also* Karen M. Ruggiero & Donald M. Taylor, *Why Minority Group Members Perceive or Do Not Perceive the Discrimination that Confronts Them: The Role of Self-Esteem and Perceived Control*, 72 J. Personality & Soc. Psychol. 373, 386 (1997). There are numerous explanations for this reluctance. Importantly, "[a]voiding attributions of discrimination enabled the subjects to preserve their socially oriented self-esteem and their feelings of control over their destiny." *Retaliation*, at 27. In fact, women will tend to explain away sexism, even when confronted with clear evidence that it has occurred. Elizabeth H. Dodd et al., *Respected or Rejected: Perceptions of Women Who Confront Sexist Remarks*, 45 Sex Roles 567, 568-69 (2001).

Vicky Crawford's experience illustrates the range of coping mechanisms women use to deal with sexual harassment in the workplace and the fear that often keeps them silent. Faced with repeated incidents of lewd sexual harassment by a high-level manager in her office, Ms. Crawford's first response was to ask him to stop. Although her efforts to handle the situation were unsuccessful, she nonetheless did not file her own report with Metro because she feared that she would face retaliation. Instead, like many women, she continued her efforts to manage the situation informally. When she was asked directly about Dr. Hughes' workplace conduct, she told the investigator about his harassment of her and of other women. After she reported her experience, she lost her job. If Ms. Crawford's story ends where the Sixth Circuit left it, it will serve as a powerful message to other sexual harassment victims that their fear of retaliation is warranted. Sexual harassment will

continue and women will continue to suffer the consequences, often in silence.

III. The Ruling Below Should be Reversed Because it Will Discourage Efforts to Eliminate Sexual Harassment

The Court's decision in this case will send a strong message to employers about how seriously they must take their legal obligation to end discrimination. In *Burlington Northern & Santa Fe Ry. v. White*, 126 S. Ct. 2405, 2414 (2006), this Court emphasized the importance of "broad protection" from retaliation as integral to accomplishing the law's objectives. "Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses." *Id.*. This case highlights the role that employers can play in either encouraging or significantly discouraging the cooperation of their employees in efforts to investigate and ultimately to eradicate discrimination.

A. An Organizational Climate That Encourages the Reporting of Sexual Harassment Is Essential

Organizational policies and organizational climate have a dramatic impact on the likelihood that women who face harassment will report it. Employers that do not tolerate harassment and that actively protect employees from retaliation for reporting misconduct will see a higher rate of reporting, and therefore will be more likely and more able to address discrimination when it occurs. *See,*

e.g. The (Un)reasonableness of Reporting, at 237-38. By contrast, employers that tolerate retaliation will see less reporting—but not less harassment. When women are fearful of reporting harassment because of possible retaliation, the harassment will go unchecked. Moreover, "[t]he relationship between discrimination and retaliation is reciprocal: just as tolerance for discrimination increases the likelihood of retaliation, retaliation also encourages further discrimination." *Retaliation*, at 41-42. The Sixth Circuit's decision permits precisely the type of employer culture least likely to eliminate harassment.

Both the nature of a woman's response to sexual harassment and the extent of harm caused by the harassment are significantly affected by the "responsiveness of other people and the organization for which she works." *Changed Women and Changed Organizations*, at 30. *See also Determinants of Target Responses to Sexual Harassment*, at 707-708. Thus, employer policies can have a direct impact on the extent and nature of the consequences for the target, including psychological, physical and professional outcomes. *The Antecedents and Consequences of Workplace Sexual Harassment*, at 133-34; *Why Didn't She Just Report Him?*, at 122 (controlling for severity of harassment, "organizational factors were the best predictors of response"). Because women's assessment of whether to report harassment depends on their evaluation of the likely consequences, an employer's policies can be structured either to encourage or to discourage women from reporting or serving as witnesses about sexual harassment.

Indeed, studies have concluded that "when an organization's responses to sexual harassment are efficacious, individuals may feel compelled to voice their concerns to a greater extent" through mechanisms such as reporting. Elissa L. Perry, Carol T. Kulik & James M. Schmidtke, *Blowing the Whistle: Determinants of Responses to Sexual Harassment*, 19 Basic & Applied Soc. Psychol. 457, 476-77 (1997).

In terms of organizational climate, researchers have identified three key predictors of whether women will report sexual harassment: "[P]erceived risk to victims for complaining, a lack of sanctions against offenders, and the perception that one's complaints will not be taken seriously." *The Antecedents and Consequences of Workplace Sexual Harassment*, at 133. These three factors correlate directly with whether an employer's complaint and investigation process is designed to encourage—and is actually perceived to encourage—reporting of illegal conduct. Ultimately, in an effective internal investigative system, reporting sexual harassment "should be viewed as an attempt to improve the organization and to contribute to the public good, not as a betrayal or something to be punished." R.J. Paul & J.B. Townsend, *Don't Kill the Messenger? Whistleblowing in America—A Review and Recommendation*, 9 Emp. Resp. & Rts. J. 149, 156 (1996).

The social science research consistently demonstrates that an effective organizational system for addressing sexual harassment must give targets and potential witnesses a clear sense that they need

not fear retaliation, that reports are treated fairly, and that reporting will not come at personal cost to the victim. *The (Un)reasonableness of Reporting*, at 232. Recognizing these facts, many guides to employer "best practices" build on the available social science research and caution that "[a]n otherwise well-conceived policy may be ineffective if it does not provide adequate safeguards against retaliation." American Bar Association, Commission on Women in the Profession, *Sex-Based Harassment: Workplace Policies for the Legal Profession*, at 26 (2d ed. 2007). Moreover, an investigative process for sexual harassment claims cannot succeed unless it protects everyone who provides information relevant to an investigation. *Id.* ("Individuals who are not themselves complainants but who assist in a sex-based harassment investigation should also be protected from retaliation under the policy.").

Vicky Crawford's experience demonstrates at least three fundamental elements of the sexual harassment reporting experience and the need for organizational responses that address them. The first, of course, is that victims of harassment are—like Ms. Crawford—likely to remain silent because of fear of retaliation for reporting. If these harassment targets also fear retaliation for answering questions in an employer investigation, they are likely to remain silent in those investigations as well.

A second common element of sexual harassment is that most instances of sexual harassment take place in private, so that an investigation is likely to lead to "he said/she said" evidence. Therefore, evidence that corroborates one side or the other is

crucial. Here, as described in the Brief for Petitioner, Metro ignored what should have been powerful corroborating evidence—testimony about being sexually harassed by Dr. Hughes from three different women. Because each woman was alone with Dr. Hughes when the harassment described occurred, none of their statements could be specifically corroborated by another witness, and Metro's final report on its investigation essentially accepted Dr. Hughes' denial that any of the harassment had occurred. However, the error of Metro's putting on blinders when it looked at the corroborating evidence (which it obtained by promising the women that they would not face retaliation) does not minimize the importance of such evidence and should not be compounded by allowing Metro to fire all of the witnesses.

A further way in which Ms. Crawford's story is typical is that targets of harassment by very senior or well-connected members of an organization are particularly reluctant to testify because of fears of retaliation. Here, Ms. Crawford recognized that Dr. Hughes was in a position to protect himself at the expense of others, and she therefore held her tongue, until asked directly, about his conduct.

These realities make especially important a reporting mechanism that safeguards witnesses—both any witness who might have information about the circumstances of a specific case and also those who can offer testimony about other misconduct by the harasser—who come forward. Investigative processes that encourage open discussion about related incidents by an alleged harasser are more

likely to uncover serious patterns of abuse. This is particularly true in light of evidence that women considering whether to report harassment are deterred by the concern that a supervisor will respond by saying that he has not heard the same kind of complaints from anyone else. Anna-Maria Marshall, *Consciousness in Context: Employees' Views of Sexual Harassment Grievance Procedures*, in Benjamin Fleury-Steiner & Laura Beth Nielsen, The New Civil Rights Research: A Constitutive Approach 101, 113 (2006).

The need for clear protection against retaliation is especially serious when the alleged harasser is a senior manager in an organization. Employees tend to believe that their employers' internal investigative processes will favor the "more important" employee. *Id.* at 110. Thus, reluctance to participate in an investigation, either as an original complainant or as a witness, becomes more likely when the person accused of harassment is higher up in the organization.

Considered in light of the available research, Vicky Crawford's experience with sexual harassment was in many ways quite typical. She, like the other women in her office and like so many other women in other workplaces, did not report the harassment directly. She was especially reluctant to do so because of Dr. Hughes' position in the organization. Eventually, though, rumors about Dr. Hughes' misconduct reached Metro's legal department and the department began asking questions. When given this direct opportunity to report the harassment she had faced, Ms. Crawford took what she knew was a

risk and told her story. In the course of her participation in this process, she expressed strong fears that she would be retaliated against. Immediately after she spoke up–participating in the internal investigation and opposing the harassment she and others had faced–Ms. Crawford was fired. The message her story will sends to other employees is that reporting sexual harassment and corroborating other women's complaints about an abusive employer are not safe choices. The message the Sixth Circuit's decision sends to employers is that a system of internal investigation of sexual harassment does not have to include any protection for women who participate, and consequently does not really have to be designed to encourage reporting of misconduct. That message is contrary to Title VII's "central statutory purpose[e] of eradicating discrimination throughout the economy," *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975), *see also Burlington Industries, Inc. v. Ellerth*, 524 U.S. at 764. It should not be condoned by this Court.

B. The Law Should Be Consistent in Encouraging the Reporting and Eradication of Sexual Harassment

The Sixth Circuit's rule is particularly troubling when considered in the context of the employer liability standards in harassment claims challenging hostile work environments created by supervisors.

This Court has given employers an affirmative defense to liability for hostile work environment harassment if they can show that they "exercised reasonable care to prevent and correct promptly any

sexually harassing behavior" and that the plaintiff "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. This affirmative defense effectively requires employers to establish internal processes for investigating and addressing allegations of sexual harassment and employees to utilize those processes. The defense is intended to further Title VII's purpose of eradicating discrimination without resort to litigation. As the Court has said, "Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms." *Ellerth*, 524 U.S. at 764.

Where the legal rules outlined by this Court so explicitly promote the creation of internal organizational structures to root out and resolve sexual harassment, the Court should ensure that those structures will in fact serve their purpose. The data on organizational climate and its impact on reporting confirm the common-sense proposition that

> courts should require that the organization demonstrate a climate intolerant of sexual harassment through a documented history of taking complaints seriously, protecting complainants from retaliation and holding perpetrators responsible for their actions. Only in such an organizational context would it be reasonable for victims to avail themselves of grievance mechanisms.

The (Un)reasonableness of Reporting, at 241.

The Sixth Circuit's decision is fundamentally inconsistent with the goals of internal investigation and resolution articulated by this Court. Without protections for those who come forward when "invited" to do so by an employer, the employer's investigation may be no more than a cynical exercise—using the cover of an investigation into suspected sexual harassment as a mechanism to identify and root out potential "troublemaker" witnesses. By denying protection against retaliation to employees who honestly and fully answer questions about workplace misconduct in an employer investigation, the decision diminishes significantly the likelihood that such an investigation will be effective. Employees who are called into an investigation will fear the consequences if they give the "wrong" answer. Employees who might otherwise have complained themselves will worry that possible corroborating witnesses will be chilled from answering their employer's questions. These silencing effects will be particularly potent in the case of sexual harassment, where research demonstrates that a host of internal and external mechanisms already pressure targets of that harassment to maintain their silence.

The costs of such silence cannot be overstated. For victims of harassment, the costs of silence are economic, physical and psychological. For organizations, the price of this silence comes in lost collaboration within the organization, decline in group and individual productivity, financial losses caused by absenteeism and poor retention. And for

society, the price of this silence is the continued prevalence of sexual harassment that remains unreported and unaddressed.

CONCLUSION

This Court should reverse the Sixth Circuit and recognize that Title VII's protection against retaliation includes employees who participate in internal investigations of misconduct and thereby oppose that misconduct.

Respectfully submitted,

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APPENDIX

APPENDIX

INDIVIDUAL STATEMENTS OF INTEREST OF *AMICI CURIAE*

AARP is a nonpartisan, nonprofit membership organization of people age 50 or older dedicated to addressing the needs and interests of older Americans. AARP supports the rights of older workers and strives to preserve the legal means to enforce them. Approximately half of AARP's almost 40 million members are in the work force and are protected by the Title VII, the Age Discrimination in Employment Act (ADEA), and other employment laws. Vigorous enforcement of these and other work place civil rights laws is of paramount importance to AARP, its working members, and the millions of other workers of all ages who rely on them to deter and remedy illegal employment discrimination.

For 125 years, the *American Association of University Women* (AAUW), an organization of over 100,000 members, has been a catalyst for the advancement of women and their transformations of American society. AAUW members belong to a community that breaks through educational and economic barriers so all women have a fair chance. With more than 1,000 branches across the country, AAUW members work to promote education and equity for all women and girls through education, research, and advocacy. AAUW mobilizes advocates nationwide on priority issues, and chief among them is women's economic security and equal opportunity in the workplace. AAUW supports workplace fairness programs and civil rights laws that promote

and enforce equal employment opportunities for women, especially those that diminish sexual harassment, promote pay equity, break the glass ceiling, and provide family friendly workplaces.

The *American Civil Liberties Union* (ACLU) is a nationwide, nonprofit, nonpartisan organization of more than 550,000 members, dedicated to preserving the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. In support of those principles, the ACLU has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*. Through its Women's Rights Project, founded in 1972, the ACLU has long sought to ensure that the law provides individuals with meaningful protection from employment discrimination on the basis of gender, including sexual harassment in the workplace. The ACLU Women's Rights Project has also urged robust legal protection for victims of sexual harassment who bring that harassment to light. The proper resolution of this case, which concerns retaliation against a harassment victim who spoke up and cooperated with her employer's investigation, therefore is a matter of substantial interest to the ACLU and its members.

The *Association for Women in Science* (AWIS) is the premier advocate organization for women in science, technology, engineering and mathematics (STEM). Founded in 1971, AWIS has consistently been in the forefront of building pathways to advancement, better work environments, and positive educational experiences for women in STEM. AWIS supports the vigorous enforcement of

all civil rights laws pertaining to workforce protection. AWIS is headquartered in Washington, D.C. with chapters throughout the United States.

The *California Women's Law Center* (CWLC) is a private, nonprofit public interest law center specializing in the civil rights of women and girls. The California Women's Law Center, established in 1989, works in the following priority areas: Sex Discrimination, Women's Health, Race and Gender, Women's Economic Security, Exploitation of Women and Violence Against Women. Since its inception, CWLC has placed a strong emphasis on eradicating sex discrimination in employment. CWLC has authored numerous amicus briefs, articles, and legal education materials on this issue. This case raises questions within the expertise and concern of the California Women's Law Center. Therefore, the California Women's Law Center has the requisite interest and expertise to join in the amicus brief in this matter.

The *Coalition of Labor Union Women* (CLUW) is an AFL-CIO affiliate with over 20,000 members, a majority of whom are women. Since 1974, CLUW has advocated to strengthen the role and impact of women in every aspect of their lives. CLUW focuses on key public policy issues such as equality in educational and employment opportunities, affirmative action, pay equity, national health care, labor law reform, family and medical leave, reproductive freedom and increased participation of women in unions and in politics. Through its more than 80 chapters across the United States,

CLUW members work to end discriminatory laws, and policies and practices adversely affecting women through a broad range of educational, political and advocacy activities. CLUW has frequently participated as *amicus curiae* in numerous legal cases involving issues of gender discrimination and pay equity. CLUW provides training and educational support to its members on issues relating to Title VII enforcement and prevention of workplace harassment and discrimination. Over the years, CLUW members have reported substantial difficulties in obtaining effective relief for harassment and other discriminatory workplace situations. The overly narrow view of retaliation adopted by the court below will likely further discourage employees from seeking redress for harassment to the detriment of all workers.

The *Connecticut Women's Education and Legal Fund* (CWEALF) is a non-profit women's rights organization dedicated to empowering women, girls and their families to achieve equal opportunities in their personal and professional lives. CWEALF defends the rights of individuals in the courts, educational institutions, workplaces and in their private lives. Since its founding in 1973, CWEALF has provided legal information and conducted public policy and advocacy to ensure women have equal employment opportunities and are free from workplace discrimination.

Dads & Daughters is the only national organization dedicated specifically to maximizing the

power and potential of father-daughter relationships. Dads & Daughters represents fathers and stepfathers across the United States who are committed to the future of their daughters and committed to making the world safe and fair for all daughters, no matter what their age. Harassment and discrimination in the workplace are direct threats to the safety of our daughters and are patently unjust for our daughters and our sons. For these reasons, we have an interest in supporting Title VII and the *amicus curiae* brief in *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee.*

Equal Rights Advocates (ERA) is a San Francisco-based women's rights organization whose mission is to secure and protect equal rights and economic opportunities for women and girl through litigation and advocacy. Founded in 1974, ERA has litigated historically important gender-based discrimination cases, including *Geduldig v.* Aiello, 417 U.S. 484 (1974), *Richmond Unified School District v.* Berg, 434 U.S. 158 (1977), and *Pallas v. Pacific Bell*, 940 F.2d 1324 (9th Cir. 1991), and is co-counsel in the current sex discrimination case of *Dukes v. Wal-Mart Stores*, in the United States District Court, Northern District of California. ERA has appeared as amicus curiae in numerous Supreme Court cases involving the interpretation of Title VII including *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993); *Faragher v. Boca Raton*, 522 U.S. 1105 (1998); and *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998). ERA has represented plaintiffs in numerous sexual harassment cases, including the first case in

the Ninth Circuit to find sexual harassment a violation of Title VII, *Miller v. Bank of America*, 600 F.2d 211 (9th Cir. 1979). In addition, ERA sponsors public policy initiatives, counsels hundreds of individual women each year on their legal right to be free from sexual harassment, and conducts sexual harassment workshops for schools and non-profit organizations.

The *Feminist Majority Foundation* (the Foundation), is a non-profit organization with offices in Arlington, VA and Los Angeles, CA. The Foundation is dedicated to eliminating sex discrimination and to the promotion of women's equality and empowerment. The Foundation's programs focus on advancing the legal, social, economic, and political equality of women with men, countering the backlash to women's advancement, and recruiting and training young feminists to encourage future leadership for the feminist movement. To carry out these aims, the Foundation engages in research and public policy development, public education programs, litigation, grassroots organizing efforts, and leadership training programs.

The *Institute for Women's Policy Research* (IWPR) is an independent, non-profit, research organization that conducts rigorous research and disseminates its findings to address the needs of women, promote public dialogue, and strengthen families, communities, and societies. The Institute works with policymakers, scholars, and public interest groups around the country to design, execute, and disseminate research that illuminates economic and

social policy issues affecting women and families, and to build a network of individuals and organizations that conduct and use women-oriented policy research. A primary focus of IWPR's research efforts is women's employment and earnings and the laws that protect a workplace free of discrimination.

Legal Momentum advances the rights of women and girls by using the power of the law and creating innovative public policy. Assuring women's equality in the workplace is central to Legal Momentum's mission. Legal Momentum has litigated eases to secure full enforcement of laws prohibiting sex discrimination, including *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and has participated as *amicus curiae* on leading cases in this area, including *Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53 (2006), Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), and *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). Because sexual harassment is so pervasive yet so often unreported, Legal Momentum is committed to securing broad protection from retaliation for women who experience and seek redress for sexual harassment.

Myra Sadker Foundation is a non-profit organization dedicated to promoting equity in and beyond schools. Myra Sadker, educator, author, and Dean at American University, exposed both the subtle and blatant education biases that limit the academic, psychological, economic, and physical

potential of both males and females. The foundation supports research, training and special programs to assist teachers, parents, children and other adults in eliminating such biases from America's schools.

Founded in. 1996, the *National Asian Pacific American Women's Forum* (NAPAWF) is dedicated to forging a grassroots progressive movement for social and economic justice and the political empowerment of Asian Pacific American women and girls. The economic empowerment of all women is one of the central issues that forms the basis of NAPAWF's advocacy. NAPAWF supports the petitioner in this case because the persistence of sexual harassment prevents women from achieving equality and economic security in the workplace.

Established in 1955, the *National Association of Social Workers* (NASW) is the largest association of professional social workers in the world with 145,000 members and chapters throughout the United States, in Puerto Rico, Guam, the Virgin Islands, and an International Chapter in Europe. With the purpose of developing and disseminating standards of social work practice while strengthening and unifying the social work profession as a whole, NASW provides continuing education, enforces the *NASW Code of Ethics*, conducts research, publishes books and studies, promulgates professional criteria, and develops policy statements on issues of importance to the social work profession. NASW recognizes that discrimination and prejudice directed against any group are not only damaging to the social, emotional, and economic well-being of the affected group's

members, but also to society in general. NASW has long been committed to working toward the elimination of all forms of discrimination against women.

The National Council of Jewish Women (NCJW) is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Resolutions state that the organization endorses and resolves to work for "the enactment and enforcement of laws and regulations that protect civil rights and individual liberties for all." Consistent with our Principles and Resolutions, NCJW joins this brief.

The *National Council of Women's Organizations* is a coalition of over 200 of the nation's largest and most influential women's groups. Representing 10 million women nationwide, NCWO groups support full enforcement of laws that prohibit sex discrimination in employment. NCWO groups recognize the long-term effects that sexual harassment has on women's economic security as well as the difficulties women face in complaining about such harassment.

The *National Education Association* (NEA) is a nationwide employee organization with more than 3.2 million members, the vast majority of whom are employed by public school districts, colleges, and universities. NEA is strongly committed to opposing employment discrimination, including

retaliation for complaining about sexual harassment, and firmly supports the vigorous enforcement of Title VII.

The National Organization for Women Foundation (NOW) is a 501(c)(3) organization devoted to furthering women's rights through education, litigation, and advocacy. NOW Foundation is affiliated with the National Organization for Women, the largest feminist organization in the United States, with over 500,000 contributing members in all 50 states and the District of Columbia. Since its inception in 1986, NOW Foundation's goals have included equality and fair treatment for women. We have a strong interest in the prevention of sexual harassment in the workplace, and in the protection of those who report such misconduct, whether within or outside of a legal proceeding. Properly applying and enforcing Title VII, and assuring the fair and equal treatment of women in the judicial system, are both interests of the NOW Foundation.

The *National Partnership for Women & Families* is a nonprofit, national advocacy organization founded in 1971 that promotes equal opportunity for women, quality health care, and policies that help women and men meet both work and family responsibilities. The National Partnership has devoted significant resources to combating sex, race, and other forms of invidious workplace discrimination, and has filed numerous briefs *amicus curiae* in the U.S. Supreme Court and in the federal circuit courts of appeal to advance the opportunities of women and people of color in employment.

The *Northwest Women's Law Center* (NWWLC) is a regional non-profit public interest organization that works to advance the rights of all women in Washington, Alaska, Montana, Idaho and Oregon, through litigation, legislation, education and the provision of legal information and referral services. Since its founding in 1978, NWWLC has been dedicated to protecting and ensuring women's legal rights, including the right to equality in the workplace. Toward that end, NWWLC has participated as counsel and as *amicus curiae* in cases involving sexual harassment and other forms of gender discrimination throughout the Northwest and the country.

The *Older Women's League* (OWL) is a non-profit, non-partisan organization that accomplishes its work through research, education, and advocacy activities conducted through its chapter network. Now in its 28th year, OWL provides a strong and effective voice for the more than 70 million women age 40 and over in America. OWL has long advocated for equality and economic security, therefore we believe that all persons should be free from sexual harassment in the workplace.

People For the American Way Foundation (PFAWF) is a nonpartisan citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, PFAWF now has hundreds of thousands of

members nationwide. PFAWF has been actively involved in litigation and other efforts to combat discrimination, and is particularly concerned that our nation's anti-discrimination laws be properly interpreted and vigorously enforced. PFAWF joins this brief because the Sixth Circuit's ruling, if not reversed, would seriously undermine the rights of all Americans to a workplace free of unlawful discrimination.

Pick Up the Pace is a San Francisco-based non-profit organization whose mission is to identify and eliminate barriers to women's advancement in the workplace, emphasizing the role of law in combating glass ceiling discrimination, cognitive bias, gender stereotyping and work/family conflict. Established in 2005, the organization seeks to raise awareness of cutting edge gender bias issues in the workplace through public education and legal advocacy, most recently as *amicus curiae* before the United States Supreme Court in *Burlington Northern & Santa Fe Railway Co. v. Sheila White, BCI Coca-Cola Bottling Co. v. EEOC,* and *Ledbetter v. Goodyear Tire & Rubber Company, Inc.*

The *Service Employees International Union*, CLC, CTW (SEIU), is an international union with 1.9 million members in the United States, Canada and Puerto Rico. As more than a majority of its members are women, SEIU has been a vigorous advocate for the rights of women and has fought to protect women from sexual harassment in the workplace.

The *Southwest Women's Law Center* is a nonprofit women's legal advocacy organization based in Albuquerque, New Mexico. Its mission is to create the opportunity for women to realize their full economic and personal potential by eliminating gender discrimination, helping to lift women and their families out of poverty, and ensuring that women have control over their reproductive lives. The Southwest Women's Law Center is committed to eliminating gender discrimination in all of its forms and ensuring broad and meaningful enforcement of anti-discrimination laws in the workplace.

The *Union for Reform Judaism* (URJ), founded in 1873, is the central body of the Reform Movement in North America including 900 congregations encompassing 1.5 million Reform Jews. The URJ comes to this issue out of our longtime commitment to asserting the principle, and furthering the practice, of the full equality of women on every level of life. We oppose discrimination against all individuals, and recognize that the insidious nature of sexual harassment may cause irreparable damage. We have developed programs that raise consciousness among men and women of the realities of sexual harassment and its impact, advocated for laws that serve to end such harassment, encouraged the creation of robust corporate policies to prevent harassment, and supported providing victims with avenues for redress.

Women Employed's mission is to improve the economic status of women and remove barriers to economic equity. Women Employed promotes fair

employment practices, helps increase access to training and education, and provides women with information and tools to plan their careers. Since 1973, the organization has assisted thousands of working women with problems of discrimination and harassment, monitored the performance of equal opportunity enforcement agencies, and developed specific, detailed proposals for improving enforcement efforts. Women Employed strongly believes that sexual harassment is one of the main barriers to achieving equal opportunity and economic equity for women in the workplace, and that being retaliated against for complaining about it is like being victimized a second time.

The *Women's Bar Association of the District of Columbia* (WBA-DC), founded in 1917, works to advance and protect the interests of women lawyers; to maintain the honor and integrity of the legal profession, and to promote the administration of justice. Among its many activities, WBA-DC develops and promotes the interests of women by monitoring legislation and filing amicus briefs on issues vital to women. WBA-DC has an interest in protecting the legal rights of women, both within and outside of the legal profession, as guaranteed by Equal Protection Clause of the U.S. Constitution and by Title VII of the Civil Rights Act of 1964. The organization is particularly interested in protecting the rights of women to work in an environment free from sexual harassment and to be able to enforce laws prohibiting sexual harassment in the workplace. Therefore, WBA-DC files as an amicus in this matter in the interest of protecting the rights of women to equality in the workplace.

The *Women's Law Center of Maryland,* Inc. is a nonprofit, membership organization with a mission of improving and protecting the legal rights of women, particularly regarding gender discrimination, employment law and family law. Through its direct services and advocacy, the Women's Law Center seeks to protect women from discrimination and harassment in the workplace.

The *Women's Law Project* (WLP) is a non-profit public interest law firm with offices in Philadelphia and Pittsburgh, Pennsylvania. Founded in 1974, the WLP works to abolish discrimination and injustice and to advance the legal and economic status of women and their families through litigation, public policy development, public education and individual counseling. Throughout its history, the WLP has worked to eliminate sex discrimination, bringing and supporting litigation challenging discriminatory practices prohibited by federal civil rights laws. The WLP has a strong interest in the proper application of civil rights laws to provide appropriate and necessary redress to individuals victimized by discrimination.

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No. 06-1595

In the Supreme Court of the United States

VICKY S. CRAWFORD,

Petitioner,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF OHIO AND 19 OTHER STATES AND COMMONWEALTHS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does the anti-retaliation provision of section 704(a) of Title VII of the 1964 Civil Rights Act protect a worker from being dismissed because she cooperated with her employer's internal investigation of sexual harassment?

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STATEMENT OF AMICI INTEREST

The Amici States have a direct interest in this case because it affects the efficacy of both state and federal efforts to combat unlawful discrimination. To begin with, the Sixth Circuit's narrow interpretation of what is required for an employee to "participate" in a sexual harassment investigation and to "oppose" an unlawful discriminatory practice threatens the Amici States' ability to enforce their own anti-retaliation provisions. Because almost every state retaliation statute mirrors the language found in Title VII,[1] the States look to federal law under Title VII for guidance in interpreting their own anti-discrimination laws. See, e.g., *Little Forest Med. Ctr. v. Ohio Civil Rights Comm'n*, 575 N.E.2d 1164, 1167

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[1] See Ala. Code § 25-1-18 (2008); Alaska Stat. § 18.80.220 (2008); Ariz. Rev. Stat. § 41-1464 (2008); Cal. Gov't Code § 12940 (2008); Conn. Gen. Stat. § 46a-60 (2008); Del. Code Ann. tit. 19, § 711 (2008); D.C. Code Ann. §2-1402.61 (2008); Fla. Stat. Ann. § 760.10 (2008); Ga. Code Ann. § 34-5-3 (2008); Haw. Rev. Stat. Ann. § 378-2 (2008); Idaho Code Ann. § 67-5911 (2008); 775 Ill. Comp. Stat. Ann. 5/6-1 (2008); Iowa Code § 216.11 (2008); Kan. Stat. Ann. § 44-1009 (2008); Ky. Rev. Stat. Ann. § 344.280 (2008); Me. Rev. Stat. Ann. tit. 5 § 4572 (2008); Md. Code Ann. art. 49B, § 16 (2008); Mass. Ann. Laws ch. 151B, § 4 (2008); Mich. Comp. Laws Serv. § 37.2701 (2008); Minn. Stat. § 181.67 (2008); Mo. Rev. Stat. § 213.070 (2008); Mont. Code Ann. § 49-2-301 (2008); Neb. Rev. Stat. Ann. § 48-1004 (2008); Nev. Rev. Stat. Ann. § 613.340 (2008); N.H. Rev. Stat. Ann. § 354-A:19 (2008); N.J. Rev. Stat. § 10:5-12 (2008); N.M. Stat. Ann. § 28-1-7 (2008); N.Y. Exec. Law § 296 (Consol. 2008); Ohio Rev. Code Ann. § 4112.02(I) (2008); Okla. Stat. tit. 25, § 1601 (2008); Or. Rev. Stat. § 659A.030 (2008); R.I. Gen. Laws § 28-5-7 (2008); S.D. Codified Laws § 20-13-26 (2008); Tenn. Code. Ann. § 4-21-301 (2008); Tex. Lab. Code Ann. § 21.055 (2008); Utah Code Ann. § 34A-5-102(17), (106) (2008); Vt. Stat. Ann. tit. 21, § 495 (2008); Wash. Rev. Code Ann. § 49.60.210 (2008); W. Va. Code Ann. § 5-11-9 (2008); Wis. Stat. § 111.322 (2008).

(Ohio 1991) ("[F]ederal case law interpreting Title VII . . . is generally applicable to cases involving alleged violations of [Ohio's employment discrimination statutes].); *Oliver v. Pac. Nw. Bell Tel. Co.*, 724 P.2d 1003, 1005 (Wash. 1986) ("RCW 49.60 [Washington's prohibition against employment discrimination] is patterned after Title 7 of the Civil Rights Act of 1964 . . . [and] decisions interpreting the federal act are persuasive authority for the construction of RCW 49.60."); *Aurecchione v. N.Y. State Div. of Human Rights*, 771 N.E.2d 231, 233 (N.Y. 2002) (explaining that New York courts attempt to "resolve federal and state employment discrimination claims consistently" and federal case law "proves helpful to the resolution" of New York discrimination claims); *McElroy v. State*, 703 N.W.2d 385, 391 (Iowa 2005) (applying the same analysis to federal and state discrimination claims because Iowa's anti-retaliation statute "is in part modeled after Title VII"). Consequently, this Court's decision interpreting Title VII's anti-retaliation provision, 42 U.S.C. § 2000e-3(a), will affect the States' interpretations of their own anti-retaliation laws.

This Court's opinion will also affect the viability of internal investigations that are critical to the States' anti-discrimination efforts. First, as *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), makes clear, employers, not courtrooms, provide the best mechanism to handle and correct employment harassment. *Id.* at 806 (explaining that litigation may be avoided if the employer provides a "proven, effective mechanism for reporting and resolving complaints of sexual harassment"). Employers can implement anti-discrimination policies and enforce those policies through internal investigations to

encourage systemic change and stop harassment much sooner than can government agencies. But when retaliatory practices chill employee participation, employers' investigations are neither complete nor completely effective. Second, if employers cannot effectively serve as the first and best line of defense, more employees will turn to state agencies charged with enforcing anti-discrimination laws, adding to States' civil rights caseloads and limiting their ability to address other discrimination issues. Third, leaving employees unprotected against retaliation during employers' internal investigations will affect employees' participation in EEOC and state-initiated investigations, because when an employee is unprotected against retaliation in one investigation, employees will be chilled from participating in all investigations.

SUMMARY OF ARGUMENT

Title VII "'evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment,'" *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)), and the statute's anti-retaliation provision must be read "to provide broad protection from retaliation" to assure the employee cooperation upon which Title VII depends. *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 126 S. Ct. 2405, 2414 (2006).

Title VII's anti-retaliation provision protects employees who either (1) oppose discriminatory conduct or (2) participate in a discrimination investigation. Specifically, the provision states that

"[i]t shall be an unlawful employment practice for an employer to discriminate against any of [its] employees . . . because [the employee] has opposed any practice made an unlawful employment practice by this subchapter" (the opposition clause), "or because [the employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter" (the participation clause). 42 U.S.C. § 2000e-3(a).

Despite the provision's clear text and purpose, the Sixth Circuit, in *Crawford v. Metropolitan Government of Nashville & Davidson County*, No.05-5258, 2006 U.S. App. LEXIS 28280, at *7 (6th Cir. Nov. 14, 2006), held that Vicky Crawford did not "participate" in an investigation for purposes of coverage under Title VII's anti-retaliation provision, 42 U.S.C. § 2000e-3(a), because no one had yet filed an EEOC Charge of Discrimination. *Id.* at *7. The Sixth Circuit further held, on the same reasoning, that when Crawford made her own complaint of sexual harassment during the same internal investigation, she did not "oppose" discrimination for purposes of coverage under § 2000e-3(a). *Id.* at *6. In short, according to the Sixth Circuit, participating in an employer's internal investigation of sexual harassment is not "participation," and opposing sexual harassment during an internal investigation is not "opposition" unless the employee initiated the original complaint for purposes of triggering Title VII's anti-retaliation protection. The court was wrong on both counts.

The primary purpose of Title VII's anti-retaliation provision—"[m]aintaining unfettered

access to statutory remedial mechanisms," *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997),—cannot be achieved if Title VII is interpreted in a way that deters victims of discrimination from complaining about harassment. Cooperation is the key to accomplishing the goals of Title VII. *Burlington*, 126 S. Ct. at 2414 (2006) ("Interpreting the anti-retaliation provision to provide broad protection from retaliation helps assure the cooperation upon which accomplishment of the Act's primary objective depends."). In fact, as this Court explained in *Faragher*, 524 U.S. 775, and *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998), cooperation with internal investigations should be encouraged.

The Sixth Circuit's decision, however, *discourages* cooperation during an employer's internal investigation. The court's narrow reading undermines Title VII's effectiveness by permitting the threat of retaliation to deter both (1) third parties from participating in discrimination investigations and (2) additional victims of discrimination from cooperating with or complaining to the EEOC. In fact, its holding provides a perverse incentive for employers preemptively to terminate employees who might bring their own Title VII claims, contrary to this Court's Title VII precedent. See *Robinson*, U.S. 519 at 346 (rejecting an interpretation of Title VII that "would provide a perverse incentive for employers to fire employees who might bring Title VII claims"). If third-party participants and additional victims of discrimination are left without protections, they will be reluctant to cooperate in internal investigations, let alone to file claims of their own.

ARGUMENT

The Court should reverse the Sixth Circuit because the text and purpose of the participation and opposition clauses protect an employee who takes part in an employer's internal investigation. This textual reading is buttressed by the reality that employers' internal investigations play pivotal roles in ensuring that workplaces are free from discrimination and harassment. See *Faragher*, 524 U.S. at 806-07. To encourage cooperation in those investigations—and thereby to promote the policies advocated in *Faragher*—the participation clause must protect *all* participants in employers' internal investigations rather than leaving some participants vulnerable to retaliation. And the opposition clause likewise must protect those who, during the course of an internal investigation, complain about harassment they have personally experienced.

A. Protection under the participation clause does not require that anyone first file an EEOC charge.

In interpreting the participation clause, the Sixth Circuit disregarded the statutory construction canon that "courts must presume that a legislature says in a statute what it means and means in a statute what it says." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). An analysis of the statutory "language itself, the specific context in which the language is used, and the broader context of the statute as a whole," *Robinson*, 519 U.S. at 341, confirms that the participation clause unambiguously protects Crawford's cooperation in her employer's investigation.

1. The "subchapter" at issue covers more than proceedings before the EEOC.

a. The Sixth Circuit ignored the text and canons of statutory construction in its unduly restrictive interpretation of "under this subchapter."

The Sixth Circuit first erred in narrowly construing the phrase "under this subchapter." The court held that "participation" covers only those activities taken after the filing of an EEOC charge. *Crawford*, 2006 U.S. App. LEXIS 28280, at *7. But that limited reading ignores the statute's plain text, which protects an employee who has "participated in any manner in an investigation, proceeding, or hearing *under this subchapter*." 42 U.S.C. § 2000e-3(a) (emphasis added). The "subchapter" under review covers an array of statutory sections; filing an EEOC charge is just one section. The language "under this subchapter," then, refers to *all* of the sections of Title VII that make employment discrimination unlawful, and *any* investigation into a violation of those laws is an investigation "under this subchapter." This is true for two reasons.

First, the "subchapter" is not limited to EEOC proceedings. Rather, "[t]he phrase 'this subchapter' refers specifically to *42 U.S.C. §§ 2000e through 2000e-17*, the provisions that set forth an employee's rights when an employer has discriminated against him or her on the basis of race, color, sex, religion, or national origin." *Slagle v. County of Clarion*, 435 F.3d 262, 266-67 (3d Cir. 2006). For example, among the many other matters addressed in the subchapter, §§ 2000e-2 and 2000e-3 identify various unlawful

employment practices, while § 2000e-16 specifically prohibits discrimination in federal government employment.

Of all the sections contained within §§ 2000e through 2000e-17, the Sixth Circuit fixated on the only one--§ 2000e-5(b)—that deals with filing an EEOC charge. But the phrase "under this subchapter" must be construed to mean what it says—that is, to encompass all of the sections within the range of provisions to which Congress expressly referred. The Sixth Circuit's contrary interpretation ignores the plain language and fails to interpret the protections afforded by § 2000e-3(a) to "assure the cooperation upon which accomplishment of the Act's primary objective depends." *Burlington*, 126 S. Ct. at 2414.

Second, "when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 n.9 (2004) (internal quotations omitted). When Congress intended in Title VII to premise the operation of a provision on the prior filing of an EEOC charge, it did so in clear and concise language. For example, § 2000e-8(a) specifically states that, "[i]n connection with any investigation of a charge filed under Section 706," the Commission shall have access to all evidence related to an investigation. In contrast, the anti-retaliation language of § 2000e-3(a) is much broader and includes within its purview any employee who has "participated in any manner in an investigation . . . under this subchapter." Thus, when Congress premised some but not all provisions

of Title VII on the filing of an EEOC charge, it is presumed that the differential treatment has some meaning.

b. Both Title VII's purpose and common sense support a broader reading of "under this subchapter."

Even if the text were ambiguous, although it is not, any such ambiguity should be resolved in favor of protection. That is so because it is the substance of the participating activity, rather than its technical form, that triggers the participation clause's protection. Indeed, several circuits have taken this path in interpreting the participation clause to protect "participation" unrelated to EEOC processes. In *Cardenas v. Massey*, 269 F.3d 251, 263 (3d Cir. 2001), for example, the lower court granted summary judgment and dismissed Cardenas's retaliation claim because he "had not shown that he engaged in a protected activity." *Id.* at 263. The Third Circuit reversed, holding that "Cardenas has pointed to evidence that he engaged in three protected activities between June 1994 and January 1995 in the form of his own discrimination complaint and his cooperation in the complaints of two other individuals." *Id.* at 263. Each of these three discrimination complaints was an internal complaint to the employer's EEO officer, not any formal charge to the EEOC. *Id.* at 260.

Other cases show that it is the type of participation, not the type of complaint, that matters. In *Evans v. Houston*, 246 F.3d 344, 352-353 (5th Cir. 2001), the Fifth Circuit reversed summary judgment in a case involving allegations of race and age discrimination during an internal grievance

hearing. The court held that because Evans was subpoenaed to be a witness in the grievance proceeding, she "participated" in activity protected under § 2000e-3(a). *Id.* at 352 n.7 ("resolving all doubts in favor of the nonmoving party, [citation omitted], we find the grievance hearing involved claims of discrimination."). And in *Hicks v. ABT Associates, Inc.*, 572 F.2d 960 (3d Cir. 1978), an employee directed his allegations of employment discrimination to HUD rather than to the EEOC. The charge was therefore lodged with an agency that is not an entity "under this subchapter." The employer argued that the employee had not "participated" under § 2000e-3(a) because he had not filed a charge with the EEOC. In response the court stated that "[d]efendant's interpretation would mean that if the employee first turned to the wrong agency even with a meritorious claim, that employee could be discharged before he was eventually directed to the EEOC. Such an interpretation would undercut the purposes of section 704." *Id.* at 969. The court further held that "[b]y addressing a complaint to HUD . . . Hicks was in the process of opposing allegedly discriminatory practices by his employer, and was protected by the Act." *Id.* The Third Circuit refused to construe "under this subchapter" so narrowly as to thwart the goals of § 2000e-3(a); the court instead looked to the substance of the participating activity.

These cases support the view that, provided an employee participates in an investigation into a matter made unlawful pursuant to §§ 2000e-2 and 2000e-3, the employer's internal investigation is an investigation "under this subchapter." This broad protection makes sense for two reasons. First, if an

employee's participation in an internal investigation is not protected, an employee will be less likely to cooperate, and the company therefore will be deprived of useful observations that could assist the employer in addressing the original complaint. Second, denying protection would frustrate § 2000e-3(a)'s primary purpose of maintaining unfettered access to Title VII's remedial mechanisms. These effects would further create an incentive for employers to terminate employees who might bring Title VII claims. See *Robinson*, 519 U.S. at 345-46 (1997) (rejecting an interpretation of Title VII that would create an incentive for employers to fire employees who might bring civil rights claims).

The Sixth Circuit's narrow interpretation of "under this subchapter" not only ignores the statutory text but also leaves third parties who participate in discrimination investigations without any protection. Internal investigations, whether initiated by employers or by government agencies, necessarily depend on third-party witnesses. The third-party employee who participates in an internal investigation engages in the same activity regardless of whether an EEOC charge has been filed. For example, if an employee files a sexual harassment charge with the EEOC against his employer and a third-party witness is questioned during the employer's ensuing internal investigation, even the Sixth Circuit's narrow interpretation would provide the third-party witness with "participation" protecting under § 2000e-3(a). But, for example, if an allegation of sexual harassment is lodged orally with the employer rather than in writing with the EEOC, then the Sixth Circuit would leave the exact same "participation" unprotected. The third-party

witness, who in either scenario might not know whether an EEOC charge has been filed, has "participated" in exactly the same manner in exactly the same internal investigation. Yet, inexplicably, his or her activity would no longer be protected due to the technical form of the original complaint. That incongruous result has nothing to do with the text of the statute and even less to do with Title VII's purpose.

Most third-party witnesses have no idea whether an EEOC charge is pending. The Sixth Circuit's decision thus has the strange result of effectively requiring a witness to ask whether a charge is pending if the witness is at all concerned about anti-retaliation protections. If a charge has been filed, participation is protected; if no charge has been filed, however, participation is not protected. Even if the witness nonetheless participates, this differential treatment could affect the fullness or forthrightness of his or her participation.

This additional burden and confusion will discourage participation in internal investigations and hamper unfettered access to the remedial statutory mechanisms of Title VII. Cooperation in an internal investigation should be encouraged, to allow employers to implement effective mechanisms for reporting and resolving sexual harassment. But the "broad [anti-retaliation] protection" previously described by this Court in *Burlington* may be accomplished only if investigation participants know that they are broadly protected, regardless of whether there is an accompanying formal written Charge of Discrimination filed under § 2000e-5.

2. Section 2000e-3(a) protects participation in a state discrimination investigation.

As explained above, nearly every State's anti-discrimination regime includes an anti-retaliation provision that protects both "participation" and "opposition" activities. Many of these States cooperate with the EEOC, and Title VII authorizes the EEOC to "utilize" state agencies to take charges on their behalf through work-sharing agreements. 42 U.S.C. § 2000e-4(g)(1); see also 29 CFR § 1626.10 (1990); *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 106 (1991) (noting that the EEOC referred a federal discrimination claim to New York's Division of Human Rights for investigation).

Filing a discrimination charge with a state agency is also protected "participation" activity because § 2000e-4(g)(1) is a provision "under this subchapter." For example, *Smith v. Columbus Metropolitan Housing Authority*, 443 F. Supp. 61, 65 (S.D. Ohio 1977), held that the participation clause protected employees against "retaliation by defendant for plaintiff's decision not to participate in a pending [Ohio Civil Rights Commission] investigation and proceeding in the manner that defendant desired." The Sixth Circuit's interpretation, however, would deny protection to a participant in a state agency's investigation unless a charge also has been filed with the EEOC. See *Crawford*, 2006 U.S. App. LEXIS 28280, at *7 (denying protection to Crawford because no EEOC charge had been filed). Thus, participants in state discrimination investigations might be left unprotected by Title VII.

Congress never intended for participation in a state-initiated investigation to strip an employee of her Title VII remedies. Why, after all, would Congress instruct the EEOC to partner with state anti-discrimination agencies but then provide no protection for persons participating in those agencies' processes? The Sixth Circuit's decision to the contrary denies protection to all non-EEOC participants and fails to take proper account of § 2000e-4(g)(1). Worse yet, if this Court adopts the Sixth Circuit's erroneous interpretation, such a ruling could have persuasive effect in States in which the anti-discrimination statutes mirror Title VII, thereby leaving some employees without federal or state protection against retaliation.

3. Title VII's objectives can only be met if participation in pre-charge investigations is encouraged and protected.

The Sixth Circuit's approach also undermines this Court's commitment to internal investigations. See *Faragher*, 524 U.S. 775; *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998). *Faragher* and *Ellerth* established a two-part affirmative defense for employers if they "exercise reasonable care to prevent and correct promptly any sexually harassing behavior" and if the employee fails to take "advantage of any preventative or corrective opportunities provided by the employer." *Faragher*, 524 U.S. at 807. In the wake of those decisions, internal policies and investigation procedures have provided employees with numerous avenues for reporting discrimination. Employees routinely use these policies and procedures before turning to the

EEOC for relief. As a result, employers' internal procedures are now essentially a pre-charge prerequisite to avoiding liability. They are part of the machinery of Title VII, in that they address and correct discrimination before the employee feels compelled to file a Charge of Discrimination with the EEOC. Accordingly, as part of the machinery of Title VII, participation in internal investigations should be protected. See *Hashimoto v. Dalton*, 118 F.3d 671, 680 (9th Cir. 1997) (recognizing that the participation clause protects participation in the machinery set up by Title VII). Third-party witness cooperation in an employer's pre-charge internal investigation should be encouraged in order to address and correct unlawful behavior without the need for litigation. Instead of promoting cooperation, the Sixth Circuit's decision denies protection to these witnesses and discourages open and honest cooperation for fear of retaliation.

The Sixth Circuit also suggested that "[e]xpanding the purview of the participation clause to cover such [internal] investigations would simultaneously discourage them." *Crawford*, 2006 U.S. App. LEXIS 28280, at *11. To suggest, however, that an employer would be discouraged from investigating an existing complaint of sexual harassment—and thereby abandon its *Faragher* affirmative defense—solely because a participant in the investigation would be protected from unlawful retaliation is untenable. The court's decision presumes that conscientious employers would rather be free to retaliate against witnesses than address complaints of sexual harassment—a presumption that is not only unsupported by the evidence, but also beside the point under Title VII. As this Court

underscored in *Burlington*, 126 S. Ct. at 2414, cooperation is desirable not just during an EEOC investigation; it is always essential, whether the complaint is oral or written, internal or to the EEOC, involving a victim or a third-party witness.

B. The opposition clause protects employees who complain about being sexually harassed, regardless of when the complaints are lodged.

1. The opposition clause protects several types of "opposition."

"Opposition" under § 2000e-3(a) can take many forms. It can include "'complaining to anyone (management, unions, other employees, or newspapers) about allegedly unlawful practices,'" *Crawford*, 2006 U.S. App. LEXIS 28280, at *6 (quoting *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 579 (6th Cir. 2000)), and complaints need not be made directly to management to constitute protected activity. In fact, even complaints voiced to a co-worker can be protected. *Neiderlander v. Am. Video Glass Co.*, No. 03-1288, 2003 LEXIS App. 22745, at *9-10 (3d Cir. Nov. 5, 2003) ("[O]pposition to discriminatory practices need not be made directly to managers in order to constitute protected activity . . . and [petitioner's] complaints to her co-workers, assuming they were communicated to management, would be the type of opposition to discrimination that § 2000e-3(a) seeks to protect."); *Mondaine v. Am. Drug Stores, Inc.*, 408 F. Supp. 2d 1169 (D. Kan. 2006) (extending Title VII protection to "[p]laintiff's complaints to her co-workers that everyone was prejudiced and that her supervisors were racist").

Courts have also routinely interpreted the opposition clause to protect more than just opposition to unlawful employment practices. The clause encompasses actions that oppose not only actual unlawful employment practices but also practices that the employee, in good faith, objectively and reasonably believes to be unlawful. *EEOC v. HBE Corp.*, 135 F.3d 543, 554 (8th Cir. 1998); *Evans v. Kan. City Sch. Dist.*, 65 F.3d 98, 100 (8th Cir. 1995). This Court has noted this application, although it has not yet had the occasion to rule on the propriety of this interpretation. See *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 270 (2001) (per curiam).

2. Crawford's complaint qualifies as "opposition."

In holding that Crawford's activity did not rise to the level of "opposition" within the meaning of the statute, the Sixth Circuit committed two errors: (1) It diminished the nature of Crawford's conduct, and (2) it raised the bar for oppositional activity above what the statute requires.

The Sixth Circuit acknowledged that "Crawford told the investigators that Hughes had sexually harassed her and other employees." *Crawford*, 2006 U.S. App. LEXIS 28280, at *3. Elsewhere, however, the Sixth Circuit minimized the extent of her protests noting only that she "appear[ed] for questioning" and "relat[ed] unfavorable information about Hughes." *Id.* at *7. That euphemistic characterization dilutes what Crawford actually said and did. According to Crawford's testimony, Dr. Hughes asked several times to see her "titties" and, on one occasion, "grabbed her head and pulled it to his crotch." *Id.* at *3 n.1 (internal quotation

marks omitted). When viewing the factual evidence and drawing the inferences in favor of Crawford, as required under the summary judgment standard, see *id.* at *2, the fuller portrayal of the events is that Crawford opposed sexual harassment.

The Sixth Circuit also held that Crawford was not "opposed" to the harassment she experienced because her activity was not sufficiently "active" or "overt." *Crawford*, 2006 U.S. App. LEXIS 28280, at *7. The court stated that, to be protected, Crawford should have "instigated or initiated [a] complaint prior to her participation in the investigation" or taken "further action following the investigation." *Id.* This holding means that Crawford was unprotected because she registered her complaint during her employer's internal investigation rather than before or after it. In other words, under the Sixth Circuit's rule, no employees who are interviewed during an employer-initiated internal investigation are protected against retaliation if they disclose during the investigation that they experienced similar discriminatory treatment.

The Sixth Circuit's approach diminishes the importance and effectiveness of internal investigations and discourages employees from reporting harassing or discriminatory conduct during the time when it is most natural to do so. Victims of harassment may view the investigation of the alleged harasser as confirmation that they are not alone. They may therefore take the opportunity of an internal investigation to report what happened to them, as well, with the assurance that they, like the original complainant, will be protected.

The Sixth Circuit's decision, however, tells victims of harassment that they must report to investigators what they observed and experienced, but they cannot "oppose" what they observed or experienced once they enter the investigation room. This narrow interpretation of what should be broad protections afforded by Title VII frustrates the statute's purpose.

3. Conduct during the course of a complaint can result in the denial of protection.

Of course, not all complaints made during an internal investigation are automatically protected against retaliation. Courts deny "opposition" protection under § 2000e-3(a) when the employee's conduct accompanying a complaint is unreasonable, inappropriate, or unlawful. *Hochstadt v. Worcester Found. for Experimental Biology*, 545 F.2d 222, 231-34 (1st Cir. 1976); see also *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 803 (1973) (recognizing that employers have a legitimate interest in employees' work performance).[2]

No facts in the record, however, suggest that Crawford's complaint was unruly, inappropriate, or

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[2] When courts deny protection under the opposition clause, typically it is because the employee either lied in his or her complaint (or the employer genuinely believed the employee's complaint was a deliberate falsehood) or, as this Court recently stated, "no one could reasonably believe that the incident recounted . . . violated Title VII." *Clark County Sch. Dist.*, 532 U.S. at 270 (per curiam); see also *Damon v. Fleming Supermarkets of Fla., Inc.*, 196 F.3d 1354, 1363 n. 3 (11th Cir. 1999) ("An employer who fires an employee under the mistaken but honest impression that the employee violated a work rule is not liable for discriminatory conduct.").

unlawful. To the contrary, the Sixth Circuit noted that Crawford was "cooperating" with her employer's, Metro School District, investigation when she delivered her complaint. *Crawford*, 2006 U.S. App. LEXIS 28280, at *7. Despite this cooperation, the Sixth Circuit's decision affirming summary judgment essentially holds that the context of Crawford's sexual harassment complaint trumps its substance.

4. Opposition does not require a victim-initiated complaint.

The Sixth Circuit's decision further suggests that Crawford's complaint was not "active" or "overt" enough to warrant § 2000e-3(a) protection because she had bad timing: "Crawford does not claim to have instigated or initiated any complaint *prior to* her participation in the investigation, nor did she take any further action *following* the investigation and prior to her firing." *Crawford*, 2006 U.S. App. LEXIS 28280, at *7 (emphasis added). As explained above, the Sixth Circuit's decision means that an employee is not engaged in protected activity so long as his or her complaint of harassment takes place during an employer's internal investigation. But this focus on the timing of Crawford's opposition, rather than its content, again elevates form over substance.

Nowhere in the statute, case law, or EEOC regulations does "opposition" activity require that the victim initiate the complaint him or herself before the employer launches an internal investigation. On the contrary, case law recognizes a broader understanding of oppositional activity. A written comment on a survey form, for instance, has been held to be protected "opposition." *Bilow v.*

Much Shelist Freed Denenberg Ament & Eiger, P.C., 67 F. Supp. 2d 955, 965-66 (N.D. Ill. 1999). Despite the fact that Bilow did not proactively instigate her complaint but instead voiced it in response to an employer-initiated survey, the court held that "Bilow has adequately alleged that she engaged in a protected activity and suffered an adverse employment action because of that activity. That is enough to save her claim from dismissal." *Id.* at 965. Surely a sexual harassment complaint made in the midst of a sexual harassment investigation warrants the same protection.

An employee should be free to report unlawful discrimination at any time. To hold that Crawford's complaint is unprotected would chill employees from providing truthful information to their employers for fear of legally sanctioned retaliation. But the Sixth Circuit's decision carves out an exception to the broad protection against retaliation when the employer, rather than the victim, initiates the forum in which the complaint took place. The Sixth Circuit provided no real rationale for this unprecedented exception, and the decision will chill an essential component to the success of Title VII: cooperation.

C. Title VII must be interpreted to accomplish the statute's remedial objectives.

Although the text of Title VII's anti-retaliation provision is clear, the statute's purpose also supports the conclusion that Crawford's conduct was protected against retaliation. Title VII is a remedial statute. *Fed. Express Corp. v. Holowecki*, 128 S. Ct. 1147, 1158 (2008); *Burlington*, 126 S. Ct. at 2415; *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997). As such,

Title VII must be construed broadly to accomplish its remedial purposes. *Jencks v. Modern Woodmen of Am.*, 479 F.3d 1261, 1264 (10th Cir. 2007) ("As a remedial statute, Title VII must be construed liberally . . . ."); *Slagle v. County of Clarion*, 435 F.3d 262, 267 (3d Cir. 2006) ("Of course because Title VII is a remedial statute, it must be interpreted liberally."); see also *Robinson*, 519 U.S. at 346 (interpreting Title VII § 704(a) to include former employees in its coverage). This rule of broad application applies with special force to Title VII's anti-retaliation provision. "Interpreting the anti-retaliation provision to provide broad protection from retaliation helps assure the cooperation upon which accomplishment of the Act's primary objective depends." *Burlington*, 126 S. Ct. at 2414.

By the same token, exceptions to the coverage provided by remedial statutes should be interpreted narrowly. Otherwise, overexpansion of an exception would protect the very harm the remedial statute was designed to prevent. See *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960) (interpreting exceptions to the remedial FLSA narrowly); *Cobb v. Contract Transp., Inc.*, 452 F.3d 543, 559 (6th Cir. 2006) ("Following traditional canons of statutory interpretation, remedial statutes should be construed broadly to extend coverage and their exclusions or exceptions should be construed narrowly.").

The Sixth Circuit's interpretation of § 2000e-3(a) protects the harm that the anti-retaliation provisions were designed to prevent. This interpretation allows employers to retaliate against their employees for participating in internal

investigations and for voicing their opposition to discrimination. This exception threatens to undermine the employee cooperation upon which Title VII depends, as well as employees' faith in anti-discrimination policies.

CONCLUSION

The Sixth Circuit's decision faults Crawford for (1) participating in Metro School District's discrimination investigation without a prior EEOC charge being filed and (2) choosing the wrong time to present her own complaint of sexual harassment. If the Court reverses this erroneous ruling, employees will still have the burden of establishing that they were terminated because they participated in the investigation or opposed discrimination. Reversing the Sixth Circuit merely confirms that employees who oppose discrimination or participate in investigations cannot be terminated for that reason.

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No. 06-1595

IN THE SUPREME COURT OF THE UNITED STATES

VICKY S. CRAWFORD,

Petitioner,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* THE TENNESSEE EDUCATION ASSOCIATION AND THE METROPOLITAN NASHVILLE EDUCATION ASSOCIATION IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

The Tennessee Education Association ("TEA") and the Metropolitan Nashville Education Association ("MNEA") submit this brief as *Amici Curiae* in support of the Petitioner Vicky S. Crawford.[1] The TEA is a voluntary membership association and is Tennessee's largest professional organization. The TEA is the Tennessee state affiliate of the National Education Association ("NEA"). The TEA's members include elementary and secondary teachers, school administrators, educational and support personnel, higher education faculty, and students preparing to become teachers in the public school setting. Over sixty percent of the 72,000 teachers currently licensed to teach in the public schools of Tennessee are members of the TEA. In addition, there are more than 2,200 non-licensed educational support members in the TEA. Among the pertinent purposes and goals of the TEA are the defense of the civil and professional rights of educators and the securing and enforcement of fair and equitable employment procedures for educators.

The MNEA is a local affiliate of the TEA. The MNEA's members include licensed educators employed in the public schools throughout the Metropolitan Nashville Public Schools, the same

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[1] The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to this Court's Rule 37.6, *Amici* state that none of the parties or its counsel wrote the brief in whole or in part and that no one other than *Amici* and their counsel made any monetary contribution to the preparation or submission of the brief.

school system out of which this action arose. Specifically, MNEA's members include elementary and secondary teachers, school administrators, educational and support personnel, higher education faculty, and students preparing to become teachers in the public school setting. More than 3,000 licensed teachers in the Metropolitan Nashville Public Schools are members of the MNEA. In addition, as the recognized professional employees' organization for professional employees in the school system, the MNEA represents the interests of all 5,600 licensed educators in the Metropolitan Nashville Public Schools, including non-members, for purposes of collective bargaining negotiations under state law.[2] The MNEA therefore negotiates employment rights and compensation for all school system educators, represents educators in employment related matters, and insures that educators' rights are protected in personnel matters. The MNEA's mission is to promote excellence in the school system, seek community support for public education, secure economic and professional security for educators, maintain a strong united teaching organization, advance human and civil rights in education, and empower teachers.

Based on the functions and missions of the TEA and the MNEA, they are interested in this

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[2] The MNEA is the recognized representative of all professional employees in the Metropolitan Nashville Public Schools pursuant to the Education Professional Negotiations Act, *Tenn. Code Ann. §§ 49-5-601 et seq.* Tennessee is a "right to work" State, so that membership in the MNEA is not required, and the MNEA has no authority to require payment of an agency fee by non-members.

precedent setting litigation which affects the rights of the professional employees that they represent. This case implicates the employment interests of teachers and others who may be called upon to testify or provide information in internal investigations of discrimination and harassment. Protecting teachers and others who participate in such internal investigations conducted by management is germane and central to the associational purposes of the TEA and the MNEA.

SUMMARY OF ARGUMENT

When an employee discloses information to her employer about sexual harassment by a supervisor, she is opposing a practice made unlawful by Title VII of the Civil Rights Act of 1964. Therefore, she should be protected from retaliation by her employer for opposing that unlawful practice. 42 U.S.C. § 2000e-3(a) makes it unlawful for an employer to discriminate against an employee because the employee "has opposed any practice made an unlawful employment practice by this title," or because the employee has participated in an investigation under Title VII.

As the Petitioner and the United States correctly argue, an employer's internal investigation of a sex harassment claim is an integral part of Title VII's enforcement scheme, and the protection of the "participation clause" rightfully extends to participation in such an internal investigation. The Sixth Circuit erred in ruling otherwise. The Sixth Circuit compounded its error when it held not only

that the "participation clause" did not extend to such an investigation, but also that the "opposition clause" afforded no remedy unless the opposition was active, consistent, and initiated by the employee. The Sixth Circuit's holding that an employee's cooperation with an employer's internal investigation is not protected under Title VII's non-retaliation provision will have detrimental effects on the rights and interests of educators, and others, called on to answer questions or provide information related to allegations of discriminatory conduct.

While *Amici* believe that the Sixth Circuit misinterpreted both the opposition and participation clauses, this brief will focus on the importance of protection under the opposition clause for *Amici's* members and others. Only by reading into the "opposition clause" a condition on the type of opposition that Congress did not place there has the Sixth Circuit denied that protection. This decision by the Sixth Circuit will discourage employees from answering questions by employers about sexual harassment and other discriminatory conduct and will undermine informal resolution of workplace discrimination issues.

The Sixth Circuit's decision turns the "opposition clause" on its head. The Sixth Circuit's decision creates a safe-haven of retaliatory conduct that is unprotected by the broad language of the opposition clause. That safe haven is contrary to the language and purposes of Title VII.

ARGUMENT

A. The Sixth Circuit wrongly concluded that opposition to an unlawful employment practice is protected only if that opposition is actively initiated by the employee and not if it takes the form of disclosures in response to employer inquiries.

Section 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-3(a), prohibits employers from retaliating against individuals who oppose practices that are unlawful under Title VII or who participate in Title VII proceedings:

> "It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice, made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title."

The pertinent words, "*because he has opposed* any practice, made an unlawful employment practice by this title," are deliberately broad. The EEOC in its Compliance Manual declares that complaining to anyone about alleged discrimination against oneself or others is an example of covered opposition conduct. *EEOC Compliance Manual, Section 8-II(B)(2).* An individual's internal complaint to a supervisor has been held to "surely" constitute

protected opposition. *Kotcher v. Rosa & Sullivan Appliance Ctr., 957 F.2d 59, 65 (2nd Cir. 1992); see also, Ray v. Henderson, 217 F.3d 1234, 1240 (9th Cir. 2000); Lambert v. Genesee Hospital, 10 F.3d 46, 55 (2nd Cir. 1993), cert. denied, 511 U.S. 1052 (1994).*

The broad protection for opposition is balanced by the requirement that the opposition be reasonable. Bad faith accusations, opposition conduct that so interferes with the performance of the job as to render the employee ineffective, and opposition that unreasonably disrupts the work place, are not protected.[3] These questions of reasonableness are matters that are proper for a trial court to address in determining whether the protection of the opposition clause is available. *See, e.g., Slagle v. County of Clarion, 435 F.3d 262, 266 (3rd Cir. 2006); Deravin v. Kerik, 335 F.3d 195, 2003 (2nd Cir. 2003); Booker v. Brown & Williamson Tobacco Co., 879 F.2d 1304, 1312 (6th Cir. 1989).*

But in this case, the Sixth Circuit did not base its decision on any conclusion about the reasonableness of Crawford's beliefs or the reasonableness of her manner of opposition.[4]

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[3] The EEOC declares that the employee must have a "reasonable and good faith belief" that the opposed practices were unlawful, and that the manner of opposition must be "reasonable" to balance the right of opposition and the public's interest with the employer's need for a stable and productive workplace. *EEOC Compliance Manual, Section 8-II(B)(3)(a) and (b).*

[4] Given the overt statements and actions of Dr. Gene Hughes described by the Sixth Circuit as well as the fact that Crawford's opposition occurred in the context of her employer's

Instead, the Sixth Circuit concluded that while a complaint made to a supervisor that is employee-initiated is protected opposition activity, a complaint made to a supervisor in response to the supervisor's inquiry is not.

Crawford was called in to meet with school system officials in connection with an investigation of sexual harassment by Dr. Gene Hughes, the school system's employee relations director. The Sixth Circuit noted that in response to questioning in the course of the investigation of Hughes' sexually harassing behavior, Crawford "told the investigators that Hughes had sexually harassed her and other employees." Crawford described in vivid detail the offensive words and actions to which Hughes subjected her. The conduct Crawford described included outrageous statements, inappropriate gestures, and, on at least one occasion, an inappropriate grabbing of Crawford by Hughes. After the investigation, Hughes was not disciplined, but Crawford and two other employees who made similar accusations against Hughes were discharged.

The Sixth Circuit considered claims by Crawford that she was terminated in violation of both the "opposition" and "participation" clauses of Section 704(a). The Sixth Circuit rejected Crawford's opposition clause claim as follows:

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internal investigation of Hughes' behavior toward a co-employee, it cannot be argued that Crawford's opposition was unreasonable.

"First, Crawford's actions do not constitute opposition under the meaning of the opposition clause. We have enumerated the types of activities that constitute opposition under Title VII: 'complaining to anyone (management, unions, other employees, or newspapers) about allegedly unlawful practices; refusing to obey an order because the worker thinks it is unlawful under Title VII; and opposing unlawful acts by persons other than the employer – e.g., former employers, union, and co-workers.' *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 579 (6th Cir. 2000). The general idea is that Title VII 'demands active, consistent "opposing" activities to warrant ... protection against retaliation.' *Bell v. Safety Grooving and Grinding, LP*, 107 F. App'x. 607, 610 (6th Cir. 2004).

"Crawford's actions consisted of cooperating with Metro's investigation into Hughes by appearing for questioning at the request of Frazier and, in response to Frazier's questions, relating unfavorable information about Hughes. Crawford does not claim to have instigated or initiated any complaint prior to her participation in the investigation, nor did she take any further action following the investigation and prior to her firing. This is not the kind of overt opposition

that we have held is required for protection under Title VII."

Crawford's actions clearly satisfied the Sixth Circuit's own *Johnson v. Univ. of Cincinnati* standard of "complaining to anyone ... about allegedly unlawful practices." In the context of Hughes' especially egregious behavior as recounted by Crawford, it cannot plausibly be suggested that she did not oppose that behavior when she described it to her employer. There are no magic words that must be used in order for opposition to be protected.

The Sixth Circuit distinguished Crawford's complaints because she did not make them prior to the investigation of someone else's complaints and because she did not actively initiate those complaints but rather made them in response to questioning in the investigation. The Sixth Circuit determined that Crawford's opposition in an internal investigation of a co-employee's harassment complaint was not protected because it was not "active" or "consistent." The Sixth Circuit emphasized that Crawford did not "instigate or initiate" a complaint prior to cooperating in the internal investigation.

"The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). The plain language of the "opposition clause" prohibits retaliation against any person "because he has opposed any practice, made an unlawful

employment practice by this subchapter." There is no ambiguity in this language, in the context in which the language is used, or in the broader context of Section 704(a). There is no justification for the Sixth Circuit's addition of requirements that the opposition be "active," "consistent," or instigated or initiated by the protected employee.[5]

Ms. Crawford's detailed account of the sexual harassment she experienced at the hands of Hughes, shared in an investigative proceeding, satisfied the reasonableness requirement that applies to opposition clause claims. It was reasonable for Ms. Crawford to participate in the internal investigation launched by her employer. It was reasonable for Ms. Crawford to respond to questions posed by her employer in an honest and truthful manner. It was also reasonable that Ms. Crawford thought she was protected by Title VII's anti-retaliation provisions when she spoke as a witness in an internal sexual harassment investigation launched by her employer.

Ms. Crawford had an obligation, as an employee, to answer her employer's questions in an honest and truthful manner. There is simply no reason why the opposition clause should provide less protection to her than it would to someone who made the same complaints to the same investigators in some other context than an employer's investigation.

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[5] Even if the "opposition clause" were somehow ambiguous, the imposition of these additional restrictions upon reasonable opposition conduct as conditions for the protection of Section 704(a) would be inconsistent with "the broader context of Title VII and the primary purpose of § 704(a)'s coverage." *Robinson v. Shell Oil Co.*, *supra*, 519 U.S. at 346.

Regardless of the context or setting in which the complaints are made, someone who makes reasonable complaints of sexual harassment is entitled to the protection of the opposition clause. There is no statutory basis for the imposition of an "active initiation" requirement superimposed on the opposition clause.

The Sixth Circuit's decision requires that in order to be protected, opposition must be "active," "consistent," and "instigated or initiated" by the complaining party so that it may be described as "overt opposition." These requirements are found nowhere in the statutory language. The Sixth Circuit erred by imposing them.

To insure that there are no gaps in the protection against retaliation that Title VII affords to employees who complain about discrimination, this Court should reverse the Sixth Circuit's overly narrow reading of both the participation and opposition clauses. Recognizing the full scope of the "opposition clause" is critical to securing protection from retaliation not only for employees like Crawford whose disclosure of employer improprieties occurred in the context of an employer investigation, but also for employees whose disclosures are made independently of such an investigation.

B. The Sixth Circuit's decision undermines the purpose of Title VII's anti-retaliation provisions.

The purpose behind Section 704(a) is to prevent employers from taking actions that will deter employees from complaining about discrimination:

> "The anti-retaliation provision seeks to prevent employer interference with unfettered access to Title VII's remedial measures. It does so by prohibiting employer actions that are likely to 'deter victims of discrimination from complaining to the EEOC,' the courts, and their employers." *Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S. 53, 126 S.Ct. 2405, 2415, 165 L.Ed.2d 345, 360 (2006) (citations omitted).*

Under the Sixth Circuit's decision, if two employees offered precisely the same sort of information in an employer's internal investigation, but one was summoned to provide information while the other volunteered to provide it, they would be treated entirely differently under the opposition clause. The one who volunteered to provide information might be protected because of her "active initiation" of opposition, while the one who was summoned would be unprotected.[6]

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[6] Even the employee who volunteered to provide information might not be protected under the Sixth Circuit's standards if

In an assortment of other circumstances, the Sixth Circuit's active initiation requirement could eliminate the protections of the "opposition clause." In a claim of retaliation for complaints made to co-employees, the complaining employee may not be protected if the conversation is initiated by the co-employee. An employee who signs a letter or petition may not be protected if someone else requested the employee's signature.

The Sixth Circuit's active initiation requirement also will undermine employers' internal resolutions of discrimination and harassment claims. Potential witnesses will be hesitant to respond to employer requests for information if they know that their responses will be unprotected because the employer initiated the exchange.[7] The harm resulting from such witness reluctance will be visited upon both employees and employers. Employees with legitimate claims of discrimination or harassment will be impaired in their ability to secure the basic guarantees of Title VII by the difficulty in obtaining corroboration from others who

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her complaint was quantitatively insufficient to constitute "active, consistent 'opposing' activities."

[7] The Sixth Circuit's decision places an employee like Crawford in an untenable position. Such an employee must either provide truthful information with knowledge that she will thereafter be without protection from retaliation since she did not actively initiate the exchange, or refuse to participate in the internal investigation and thereby be subject to possible termination for insubordination. Congress could not have intended that the "opposition clause" be read to turn internal employer inquiries into such a Hobson's choice for employees.

may have knowledge but are reluctant to share that knowledge for fear of retaliation. Employers who in good faith desire to resolve workplace discrimination issues will find that their ability to do so informally and internally is limited by the reluctance or resistance of employees who fear retaliation without recourse.

The EEOC has informed employers that anti-harassment policies are ineffective without assurances to employees that participation will not result in retaliation:

> "An employer should make clear that it will not tolerate adverse treatment of employees because they report harassment *or provide information related to such complaints.* An anti-harassment policy and complaint procedure will not be effective without such an assurance." *EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment By Supervisors (http//www.eeoc.gov/policy/docs/harassment.html).*

The Sixth Circuit's decision, if left undisturbed, will produce precisely the result that the EEOC warns against in this guidance – it will render the employer's anti-harassment policy and complaint procedure ineffective.[8]

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[8] An employer's anti-harassment policy and complaint procedure may not satisfy the requirements of *Faragher* and

Not only do the Sixth Circuit's added requirements find no support in the language of the "opposition clause," those requirements undermine the purpose of the "opposition clause." The "opposition clause" encourages employees to address their complaints informally by insuring that informal opposition may not lead to retaliatory conduct. This protection from retaliation, in conjunction with the types of anti-harassment policies and procedures discussed in *Faragher* and *Ellerth*, should encourage employers and employees to resolve discrimination and harassment claims promptly and informally where possible. By limiting the protections of the "opposition clause," the Sixth Circuit's decision will discourage informal exchanges between employer and employee. The result will be an increase in costs and burdens to parties, the EEOC, and the courts as more complaints of discrimination and harassment must be resolved through formal charges and lawsuits.

The Sixth Circuit's decision does not further the Congressional policy underlying the anti-retaliation provisions of Title VII and is inconsistent with the plain meaning of the opposition clause. The Sixth Circuit's decision undermines the benefits to

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Ellerth if it does not protect employees from retaliation. *Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Industries v. Ellerth, 524 U.S. 742 (1998).* But the loss of the *Faragher* and *Ellerth* defense will only affect the claim under investigation by the employer. Witnesses will still be unprotected from retaliation. For unscrupulous employers, the Sixth Circuit's decision may well undermine the salutary effects of *Faragher* and *Ellerth*.

both employers and employees that flow from employers' informal and internal investigations. The Sixth Circuit's decision undermines the intended purposes of Section 704(a), contrary to its plain language and to the interpretation of that language by the EEOC, by removing its protections from employees whose complaints are in response to employer inquiries. The Sixth Circuit's decision adds to the "opposition clause" a vague requirement of "active, consistent" opposition, along with a display of "overt opposition" in the form of instigating or initiating a complaint. These requirements are not a part of the "opposition clause" and are irrational and inconsistent with the intended protection of the "opposition clause."

CONCLUSION

The TEA and the MNEA as *Amici Curiae* respectfully submit that the Sixth Circuit's decision should be reversed.

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